90-461

No. 89-

In The

Supreme Court of the United States

OCTOBER TERM, 1989

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

LANI MOORE, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the Handicapped Children's Protection Act, unlike every other civil rights act, permits a party who prevails in an administrative proceeding to bring a civil action solely for the purpose of securing attorneys' fees.

PARTIES

In the court of appeals, the parties were: (1) the District of Columbia and Dr. Andrew E. Jenkins III, Superintendent, D.C. Public Schools, petitioners here; and (2) Lani Moore, Dwight and Anita Moore, Morgan Fishman, Charles and Margaret Fishman, Jennifer Daley-Hynes, Hillary and Kathy Daley-Hynes, Kelly Rastatter, Edmund and Clem Rastatter, Robert White, Lois White, Anika Cox, Courtland and Frankie Cox, Peter Cook, Stephen Cook, Michael Holmes, Gerald Holmes, Tacuma Akwiah Hampton-Day and Demetra Hampton, respondents here.

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The District of Columbia and Andrew E. Jenkins III, Superintendent of the District of Columbia Public Schools, petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The June 19, 1990, decision of the United States Court of Appeals for the District of Columbia Circuit sitting *en banc* is reported at 907 F.2d 165. App. 1a-24a. The June 20, 1989, decision of a three-judge panel of that court is reported at 886 F.2d 335. App. 25a-67a. The August 24, 1989, order granting *en banc* review (App. 76a) is not reported.

The relevant opinion of the United States District Court for the District of Columbia was issued on July 27, 1987, and is reported at 666 F. Supp. 263. App. 68a-74a.[1]

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[1] This is the opinion ruling that petitioners are liable for attorneys' fees. The district court's opinion of November 30, 1987, assessing the amount
[Footnote continued on next page]

JURISDICTION

The judgment of the Court of Appeals sitting *en banc* was entered on June 19, 1990. App. 77a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant text of 20 U.S.C. § 1415 is reproduced in the appendix to this petition. App. 78a-82a.

STATEMENT OF THE CASE

I. INTRODUCTION.

In 1975, Congress enacted the Education of the Handicapped Act ("EHA"), Pub. L. 94-142, 20 U.S.C. § 1400 *et seq.*, to ensure that handicapped children are provided a free appropriate public education. In 1984, this Court ruled that the EHA did not permit an award of attorneys' fees to parents who prevail in litigation to enforce the educational rights it created. *See Smith v. Robinson*, 468 U.S. 992 (1984). This Court also ruled that neither the Rehabilitation Act of 1973, 29 U.S.C. § 794(b), nor 42 U.S.C. § 1988 permitted an award of fees in cases seeking to enforce guarantees that are also encompassed by the EHA's comprehensive scheme. Two years later, Congress overturned *Smith v. Robinson* when it enacted the Handicapped Children's Protection Act of 1986 ("HCPA"), Pub. L. 99-372, 100 Stat. 796-98 (1986), 20 U.S.C. § 1415(e)(4)(B) *et seq.*

This case presents the question whether the HCPA authorizes parents who prevail in EHA administrative proceedings to bring a unique civil action solely to recover

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[Footnote continued from previous page]
of fees, is reported at 674 F. Supp. 901. This opinion is not included in the appendix because this aspect of the appeal is still pending in the court of appeals and because petitioners have no intention of seeking review of that matter in this Court. On the distinct issue of fee liability, the court of appeals entered a separate judgment dated June 19, 1990. App. 77a.

attorneys' fees. A divided panel of the District of Columbia Circuit, in an exhaustive and painstaking opinion, held that it does not. The court sitting *en banc* disagreed.

We submit that the panel decision, rejecting an unprecedented exception to the American Rule governing attorney-fee awards, is correct. The language of the EHA, as amended by the HCPA, authorizes fees only for parents who must resort to the courts to vindicate their child's educational rights. The legislative history does not clearly indicate that Congress meant something different from the language it enacted, as would be required to set aside the plain meaning of the statute. What the legislative history does show is that Congress intended that fees be awarded under the HCPA in the same circumstances that they are awarded to other civil rights litigants. The *en banc* court has confounded that intent by creating under the HCPA a right to fees that does not exist under any other fee-shifting statute.

II. THE STATUTORY SCHEME.

The EHA requires state and local governments, which accept federal educational funds, to identify handicapped children within their jurisdiction and to develop for each of them an individualized educational program ("IEP"). If a parent objects to the IEP (or to any aspect of his or her child's educational program), the EHA requires a due process hearing before an impartial administrative agency. A decision in that forum may also be subject to state-level administrative review.[2] Any party aggrieved by a final administrative decision, whether a parent or a school system, may seek judicial review in the local or the federal courts.

Prior to its amendment in 1986, § 1415 of the EHA contained five subsections, including subsection (b), requiring IEPs and due process hearings; subsection (c), providing for state-level review of due process hearings; and subsection (e),

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[2] In the District of Columbia, only a due process hearing is available.

providing for civil actions. Subsection (e), in turn, was subdivided into several paragraphs: (e)(1), declaring that decisions in due process hearings and state-level review proceedings are final with certain specified exceptions; (e)(2), permitting judicial review of final, administrative decisions at the behest of a party aggrieved; (e)(3), barring school systems from unilaterally altering a child's educational placement pending completion of the "proceedings" established in § 1415; and (e)(4), conferring jurisdiction on courts "of actions brought *under this subsection* . . .." (Emphasis added). More particularly, paragraph (2) of subsection 1415(e) provided in pertinent part:

> *Any party aggrieved by the findings and decision* made under subsection (b) of this section who does not have the right to appeal under subsection (c) of this section, and *any party aggrieved by the findings and decision* under subsection (c) of this section, *shall have the right to bring a civil action* with respect to the complaint presented pursuant to this section, which action may be brought . . . in a district court of the United States without regard to the amount in controversy . . ..

(Emphasis added).

These provisions remained unchanged when the EHA was amended by the HCPA, although § 1415(e)(4), the jurisdictional provision, was renumbered as § 1415(e)(4)(A). Insofar as is relevant here, what Congress did in 1986 was to add, after the renumbered jurisdictional provision, a fee-shifting provision; an offer-of-settlement provision; and a provision stating that the EHA, as amended, is not exclusive.

The fee-shifting provision, § 1415(e)(4)(B), states:

> In any action or proceeding *brought under this subsection, the court*, in its discretion, *may award reasonable attorneys' fees* as part of the costs to the parents . . . of a handicapped child . . . who is the prevailing party.

(Emphasis added).

In the offer-of-settlement provision, § 1415(e)(4)(D), Congress directed that parents be denied fees otherwise award-

able for services performed after they reject a timely settlement offer if a "court or administrative officer finds that the relief finally obtained by the parents . . . is not more favorable . . . than the offer of settlement."

Finally, in a new subsection, § 1415(f), Congress expressly preserved for handicapped children all rights and remedies conferred by other laws, such as 42 U.S.C. §§ 1983 & 1988. It directed, however, "that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section [due process hearings and state-level administrative review] shall be exhausted to the same extent as would be required had the action been brought under this subchapter."

III. PERTINENT PROCEEDINGS IN THE COURTS BELOW.

A. The District Court.

This suit was brought in the United States District Court for the District of Columbia by several handicapped children and their parents who prevailed in EHA due process hearings. It was brought not for the purpose of securing any educational benefits but solely for the purpose of seeking reimbursement from the District of Columbia for attorneys' fees they incurred in the due process hearings. Jurisdiction was invoked under 20 U.S.C. § 1415(e)(4)(A).

The district court, Judge Stanley Sporkin, ruled that fee awards may be made not only to parents who must go to court to secure the educational rights guaranteed by the EHA and who prevail in that forum, but also to parents who prevail in a due process hearing and need not go to court. In the latter instance, Judge Sporkin ruled, the HCPA authorizes parents to sue solely for the purpose of securing attorneys' fees incurred in a due process hearing.

B. The Panel Opinion in the Court of Appeals.

A panel of the court of appeals reversed in a two-to-one decision. Judge Daniel M. Friedman of the Federal Circuit,

sitting by designation, wrote the majority opinion in which Judge Stephen F. Williams joined; Judge Harry T. Edwards dissented. The majority ruled that parents who prevail in an EHA due process hearing, and thus are not aggrieved, may not bring a suit solely for the purpose of securing attorneys' fees.

Judge Friedman's opinion constituted the first exhaustive judicial analysis of the HCPA's statutory language and its legislative history. The principal points of his analysis are as follows.

1. The statutory language.

Judge Friedman began by construing the words of the fee shifting provision — " '[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees . . . to the parents . . . of a handicapped child . . . who is the prevailing party.' " App. 29a, quoting § 1415(e)(4)(B). According to Judge Friedman, "[t]he reference to 'brought under this subsection' is to subsection (e), which is one of six subsections of section 1415." App. 29a-30a. When Congress wished to refer to other provisions of the statute, it did so by using different terms. See App. 30a, citing § 1415(e)(2) ("complaint presented pursuant to this section"); § 1415(e)(3) ("[d]uring the pendency of any proceedings conducted pursuant to this section"). Here, "[t]he only reference in subsection 1415(e) to the bringing of actions or proceedings is the statement in § 1415(e)(2) that '[a]ny party aggrieved by the findings and decision' " made in administrative proceedings pursuant to subsections (b)(2) or (c) " 'shall have the right to bring a civil action . . . .' " App. 30a. As a consequence, the EHA, even as amended, permits only a party aggrieved by a decision at the administrative level to bring a court action.

In so ruling, Judge Friedman also concluded:

a. Parents who prevail at the administrative level do not become prevailing parties for the purpose of the fee-

shifting provision. That provision, § 1415(e)(4)(B), refers only to a " 'prevailing party' " in an " 'action or proceeding brought under this subsection,' " that is, subsection (e). App. 32a. Due process hearings and state-level administrative review of those hearings are brought pursuant to subsections (b)(2) and (c) of § 1415. App. 30a-33a.

b. The mere use of the term "proceeding" in the fee-shifting provision does not itself permit an action for fees alone. The use of the qualifier, "brought under this subsection," precludes such a broad construction of the term "proceeding." App. 32a.

c. The offer-of-settlement provision, which bars an award of fees in certain circumstances — when a parent rejects a settlement offer that turns out to be at least as favorable as the relief finally obtained — "does not authorize the award of attorney fees for administrative proceedings." App. 34a. Instead, this provision merely denies an award of fees in civil actions in which they would otherwise be available under § 1415(e)(4)(B), *i.e.*, in a court case on the merits in which a parent prevails. App. 34a.

2. This Court's fee decisions.

In support of the panel's ruling, Judge Friedman also analyzed *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), and *North Carolina Dept. of Transp. v. Crest Street Community Council, Inc.*, 479 U.S. 6 (1986). He concluded:

a. *Carey* states that an action for fees alone may be brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), pursuant to the "action or proceeding" language of Title VII. App. 34a-35a. However, as Justice Stevens expressly noted in *Carey*, that statement is *obiter dictum* because " '[w]hether Congress intended to authorize a separate federal action solely to recover costs, including attorney's fees, incurred in obtaining administrative relief . . . is not only doubtful but is a question that is plainly not presented by this record.' " App. 36a, *quoting Carey*, *supra*, 447 U.S. at 71 (Stevens, J., concurring).

b. *Crest Street* holds that 42 U.S.C. § 1988 does not permit an action solely to recover fees incurred in an administrative proceeding to enforce one's civil rights even though § 1988 provides that fees may be awarded "[i]n any action or proceeding to enforce" enumerated civil right laws. In *Crest Street*, moreover, a majority of this Court expressly disavowed the *Carey dictum*. App. 36a-38a.

3. The legislative history.

In analyzing the legislative history, Judge Friedman began by acknowledging that "[t]he 'plain language' of § 1415(e)(4)(B) 'controls its construction, at least in the absence of clear evidence, of a clearly expressed legislative intention to the contrary.' " App. 39a, *quoting, inter alia, Bread Political Action Comm'n v. FEC*, 455 U.S. 577, 581 (1982). He then engaged in an extensive analysis of the legislative history (App. 39a-56a) and concluded:

a. The House intended to authorize an action for fees alone and used the phrase "action or proceeding" in the fee-shifting provision to achieve that purpose. App. 54a.[3]

b. The Senate did not clearly intend to authorize an independent fee action.

(i) The Senate Report is ambiguous. App. 55a. The report states that the legislation is intended to permit fee awards " 'on a basis similar to other fee shifting statutes.' " App. 42a-43a, *quoting* S. Rep. No. 99-112, 99th Cong., 1st Sess. 14, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1804 (1985). The report also states that the legislation should be interpreted like Title VII; refers to *Carey*; and compares *Carey* to *Webb v. Dyer County Board of Education*, 471 U.S. 234 (1985), in which this Court denied fees for

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[3] The 1985 House Report stated that this language was intended to authorize an independent fee action; and this interpretation was confirmed by the House floor manager, Representative Williams, in 1985. See App. 48a-49a, 50a.

work done in administrative proceedings. However, neither case "involve[d] a suit brought solely to obtain fees for work done in . . . administrative proceedings." App. 55a-56a. As a consequence, the Senate Report "may have been suggesting only that parents who prevail in an EHA judicial action also will be awarded fees for work done at the administrative level." App. 56a.

(ii) The floor debates in the Senate do not clearly establish an intent to authorize an action for fees alone. In these debates in 1985 and 1986, the *Carey dictum* and an independent fee action were mentioned only once. App. 55a. In 1985, Senator Simon cited the *Carey dictum* and stated that, under its reasoning, the HCPA should be construed as authorizing an independent fee action. App. 45a-46a, 55a. The other Senators who addressed the measure in 1985 and 1986, as well as Senator Simon in 1986, urged that it was needed to ensure fees when parents must go to court to secure their child's educational rights. App. 43a-45a, 52a-53a.

(iii) The conference committee report, issued just before the 1986 floor debates, is ambiguous. App. 56a. Both the Senate and House bills contained the "action or proceeding" language. However, the House, but not the Senate, bill contained a "sunset" provision which the conference report described as "terminating 'the court's authority to award fees at the administrative level' " after a four-year period. App. 56a. At the conference, the "sunset" provision was rejected. That action, however, "does not establish that the conferees believed the bill they recommended" authorized an independent fee action. App. 56a. Thus, one "plausible explanation . . . [for rejecting the "sunset" provision] is that the Senate conferees did not believe the conference bill contained that authority, so that there was no reason to terminate it after that time." App. 56a.

In short, because there was no clear evidence of a clearly expressed intention in both Houses of Congress to create an independent fee action, the plain language of the EHA, as amended by the HCPA, was controlling.

C. The *En Banc* Opinion in the Court of Appeals.

The court of appeals, sitting *en banc*, declined to follow the reasoning of Judge Friedman's opinion. In his opinion for the *en banc* court, Judge Edwards took an approach that superficially paralleled that taken by Judge Friedman but was, in fact, radically different.

1. The statutory language.

In construing the statutory language, Judge Edwards concluded:

a. The phrase "action or proceeding" in the fee-shifting provision must be examined in isolation. App. 6a. When that is done, the court was "at a loss to give meaning to the distinction between 'action' and 'proceeding' short of inferring that Congress meant to authorize fees for parents who prevail either in a *civil action* or in an *administrative proceeding* under EHA." App. 6a (emphasis supplied by court).

b. Elsewhere in the EHA and the HCPA, Congress used the "identical" terms to "distinguish between the administrative and judicial phases of EHA litigation." App. 6a. Thus, in § 1415(e)(2), the EHA authorizes a " 'civil action' " in courts and requires that " 'in any *action* . . . the court shall receive the records of the administrative *proceedings* . . . .' " App. 6a (emphasis supplied by court).

c. The "contemporaneous judicial construction of the phrase 'action or proceeding' " in the *Carey dictum* supports construing the identical phrase in the HCPA as authorizing an independent fee action. App. 7a. *Crest Street* is not relevant because it was decided after the HCPA was enacted. App. 8a-9a.

d. The offer-of-settlement provision would not make sense in the absence of an independent fee action. For example, even though the HCPA does not define when an administrative officer is to compare the relief a parent finally obtains with a settlement offer, the provision must be read

to permit this comparative assessment "only in the event that the parent achieves 'final[ ]' relief in an administrative proceeding . . . ." App. 10a. As a consequence, the "HCPA clearly contemplates that the issue of attorney fees will survive an otherwise successful outcome for the parent at the administrative stage." App. 10a.

e. The qualifier, "brought under this subsection," in the fee-shifting provision does not mean that parents may secure fees only if they prevail in a civil action on the merits. App. 12a-14a. Instead, a suit to recover fees may be brought "*directly* under section 1415(e)(4)," and such an action "is as much a suit 'under' subsection 1415(e) as is a suit challenging an adverse administrative determination under section 1415(e)(2)." App. 13a (emphasis supplied by court). Furthermore, Congress plainly erred in enacting the term "subsection" in the fee-shifting provision, as well as in the non-exclusivity provision. App. 14a.

2. The legislative history.

Judge Edwards also analyzed the legislative history. However, he concluded that the Senate intended to authorize an independent fee action.

a. The reference to *Carey* in the Senate Report supports an independent fee action because *Carey* "unambiguously concluded *both* that [Title VII] . . . authorizes recovery of fees incurred in necessary administrative proceedings *and* that a party who prevails at that level can sue for fees." App. 17a (emphasis supplied by court).

b. In the Senate debates, only Senator Simon addressed the precise issue of an independent fee action and he advocated adoption of the *Carey dictum*. App. 18a. The repeated statements of Senator Weicker, the architect of the HCPA, and of other Senators, that the bill was intended to provide fees to parents who must go to court to secure their child's educational rights merely illustrate one application of the HCPA. App. 20a-21a. Because not one Senator took issue with the 1985 Senate Report's reference to *Carey* or

with Senator Simon's adoption of the *Carey dictum* in 1985, the view expressed by that report (as construed by the court) and by Senator Simon should be accepted "as the one adopted by the full Senate." App. 21a.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The court of appeals has sharply departed from this Court's decision in *Crest Street*. Contrary to *Crest Street*, it has held that, when a federal fee-shifting statute contains the phrase, "action or proceeding," that language authorizes a civil action solely for the purpose of securing attorneys' fees incurred in an administrative proceeding. Its ruling in this case permits parents of a handicapped child to seek fees whenever an administrative officer determines that a school district has failed to comply with the EHA in some respect and thus treats these persons far more favorably than, for example, victims of intentional racial or gender-based discrimination. This ruling cannot be squared with the language of the HCPA or with the legislative history in the Senate. Furthermore, there is no evidence that either House of Congress wanted to authorize fee awards in circumstances not permitted by other fee-shifting statutes.

Review of the *en banc* opinion is necessary for several reasons. The court of appeals has decided a legal issue of nationwide significance that should be decided by this Court. Furthermore, as demonstrated by Judge Friedman's opinion, that court's analysis of the HCPA's language and legislative history squarely conflicts with this Court's decision in *Crest Street* and is wrong. The HCPA, like other fee-shifting statutes, authorizes an attorney-fee award for administrative proceedings only in a civil action in which the substantive or procedural rights conferred by law are at issue.

I. THE *EN BANC* COURT'S INTERPRETATION OF THE PHRASE "ACTION OR PROCEEDING" SQUARELY CONFLICTS WITH *CREST STREET* AND IS WRONG.

In *Crest Street*, this Court ruled that 42 U.S.C. § 1988 does not permit an action solely to recover attorneys' fees incurred by a party who enforces his civil rights in an administrative proceeding even though § 1988 permits a fee award "[i]n any action or proceeding to enforce" specified civil rights laws.[4] In *Crest Street*, this Court held that attorneys' fees may not be awarded under § 1988 in "a court action *other than* litigation in which a party seeks to enforce the civil rights laws listed in § 1988." 479 U.S. at 12 (emphasis in original).

Crest Street cannot be distinguished from this case on the grounds that § 1988, unlike § 1415(e)(4)(B), contains the phrase "to enforce." The "to enforce" language was not critical in *Crest Street*, and the case would have been decided in the same way had § 1988 permitted a fee award in "any action or proceeding brought under" specified civil rights laws. Alternatively, the HCPA contains language that is the functional equivalent of the "to enforce" language of § 1988. The HCPA permits fee awards only in "any action or proceeding brought *under this subsection*" — *i.e.*, only in a case brought by a party aggrieved by an administrative decision. § 1415(e)(4)(B) (emphasis added). As this Court explained in *Crest Steet*, the language of § 1988 is "identical" to that of Title VII, construed in *Carey*, even though Title VII, which permits a fee award "[i]n any action or proceeding under" that provision, does not contain any "to enforce" language. *Crest Street*, *supra*, 479 U.S. at 15. Even the *Crest Street*

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[4] However, "[a] court hearing one of the civil rights claims covered by § 1988 may still award attorney's fees for time spent on administrative proceedings to enforce the civil rights claim prior to the litigation." *Id.* at 15.

dissenters agreed that § 1988 and Title VII must be construed in the same manner. As Justice Brennan observed,

> *Carey* cannot be distinguished from the case before us. Section 1988 employs phraseology virtually identical to that used in the Title VII fee provision at issue in *Carey*, and the relevant Committee Reports underline Congress' intent to model § 1988 after the Title VII fee provision.

Id. at 20-21 (Brennan, J., dissenting) (footnotes omitted).

The *en banc* opinion thus contradicts the central message of *Crest Street*: the phrase, "action or proceeding," in a fee-shifting statute does not itself permit the conclusion that a person who prevails in an administrative proceeding may bring a court action for fees alone. Indeed, the approach taken in the *en banc* opinion is exactly the approach advocated by the dissenting opinion in *Crest Street*.

The *en banc* opinion's analysis of the language of the EHA, as amended by the HCPA, is flawed in other respects.

1. The opinion ignores Congress' frequent use of the terms "action" and "proceeding" in statutes to mean a judicial action or proceeding.[5]

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[5] *See, e.g.*, 28 U.S.C. § 1251 (conferring original but not exclusive jurisdiction on this Court in "actions or proceedings" involving ambassadors and other foreign officials); 28 U.S.C. § 1337 (conferring original jurisdiction on the United States district courts "of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies . . . ."); 28 U.S.C. § 1875(d)(2) (providing for attorneys' fees in "any action or proceeding" in which an employee proves that his employer has discriminated against him based on jury service even though the statute does not provide for any administrative proceeding by which an employee can vindicate his right). The use of both terms, action and proceeding, may reflect the distinction between law and equity that once played an important role in American jurisprudence, a practice that continues despite the virtual abolition of the distinction. *See* Fed. R. Civ. P. 2 ("There shall be one form of action to be known as 'civil action.' ").

2. The opinion is wrong in stating that elsewhere in the HCPA, Congress used language "identical" to that contained in the fee-shifting provision in order "to distinguish between the administrative and judicial phases of EHA litigation." App. 6a. On the contrary, even in the examples set forth in the opinion, Congress did not use the phrase, "proceeding brought under this subsection," but instead used the language, "administrative proceeding," to refer to an EHA administrative proceeding. Thus, as the *en banc* opinion itself notes, § 1415(e)(2), which authorizes a civil action by a party aggrieved, also states that "the court shall receive the records of the *administrative* proceedings . . . ." *See* App. 6a (emphasis added). By contrast, the fee-shifting provision, § 1415(e)(4)(B), does not state "any action or administrative proceeding." Furthermore, elsewhere in the HCPA, Congress used the word "proceeding" to refer to both judicial and administrative proceedings. In the "stay-put" provision, Congress specified that a school system may not unilaterally change the educational placement of a child "[d]uring the pendency of any *proceedings conducted pursuant to this section* . . . ." § 1415(e)(3) (emphasis added). The "proceedings" encompassed by the stay-put provision include not only administrative proceedings pursuant to § 1415(b)(2)&(c), but judicial proceedings pursuant to § 1415(e)(2) as well. *See Andersen v. District of Columbia*, 877 F.2d 1018 (D.C. Cir. 1989).

3. The opinion is wrong in concluding that Congress erred in enacting the term "subsection" in the fee-shifting provision, as well as in § 1415(f), which permits EHA litigants to pursue relief under other laws, but which also requires exhaustion of available EHA administrative remedies (§1415(b)(2)&(c)) before pursuing such relief. On the contrary, Congress did not carelessly err in selecting the language that it did; and § 1415(f) otherwise indicates that Congress did not authorize an independent fee action.

a. Subsection (e) of § 1415 plainly encompasses paragraph (2) of subsection (e), which authorizes only "ag-

grieved" parties to bring a civil action. Similarly, the reference contained in subsection 1415(f) to "subsections (b)(2) and (c) of this section" is also correct because paragraph (2) of subsection (b) is still part of subsection (b). It is entirely correct for Congress to use the term "subsection" when referring to a part of a designated subsection.

b. Subsection (f) of the HCPA permits parents to bring an action under § 1983 for a violation of the EHA, but it also provides that, if the relief sought is also available under the EHA, they must exhaust the EHA's administrative remedies. In a case seeking relief under § 1983, however, if a parent prevails in the administrative proceeding, *Crest Street* makes clear that no action for fees may be brought pursuant to § 1988. The fact that the other rights and remedies extended by § 1415(f) do not include an independent fee action for EHA violations suggests that the HCPA fee provision does not create such an action in an EHA case.

4. The opinion is wrong in stating that an independent fee action is necessary to make the offer-of-settlement provision meaningful.

a. The offer-of-settlement provision simply does not address the circumstances in which fees may be awarded but only those circumstances in which fees that *otherwise may be awarded to prevailing parents under the fee-shifting provision* may be denied. In context, § 1415(e)(4)(D) provides that, if parents reject a settlement offer, they may not recover attorneys' fees accrued thereafter if *the relief they ultimately obtain in court, in an action brought by an aggrieved party,* is not more favorable than the settlement offer. Conversely, if parents reject a settlement offer made before a due process hearing and prevail in that hearing, and there is no court litigation brought by an "aggrieved" party, the settlement provisions do not even come into play because no attorneys' fees may be awarded under the HCPA in the absence of litigation on the merits. Here, as in other fee-shifting statutes, the fact that the relief "finally" obtained may be obtained

in an administrative proceeding does not mean that Congress authorized an independent fee action.

b. Even without independent fee actions, hearing officers have a role to play in comparing settlement offers and the relief parents finally obtain. In the HCPA, Congress did not empower hearing officers to award fees. As a consequence, and in the context of the entire statutory scheme, it is plain that the hearing officer's role is limited. In a judicial proceeding involving a parent who has rejected a settlement offer and who prevails on the merits in that proceeding, the court may make the comparative assessment, or the court may remand the matter to the hearing officer and make its award of fees contingent upon a comparative analysis in that forum. Alternatively, a hearing officer may make a comparative evaluation when issuing his decision in the due process hearing, and this evaluation may be considered by the court if litigation on the merits ensues.

c. The timing provisions for settlement offers are also meaningful even if the HCPA does not authorize an independent fee action. Under the HCPA, a school system is permitted to make a settlement offer ten days before a due process hearing, ten days before a trial begins, and successive settlement offers. A school system thus may make an offer ten days before a due process hearing and, if the relief finally obtained by a parent is not more favorable than the offer, the parent — who must otherwise be in court on the merits — is precluded from obtaining *any* fees incurred *after the offer* even if the parent prevails in court.[6]

* * *

[6] Alternatively, if a school system makes a settlement offer fewer than ten days before a due process hearing but at least ten days before trial in accordance with Fed. R. Civ. P. 68, that offer cannot preclude fees incurred for the due process hearing but only fees incurred in connection with the judicial proceeding. Finally, a school system may make an offer before a due process hearing and a more favorable offer before trial; in those circumstances, whether, and to what extent, fees may be awarded may require two comparative analyses with the relief finally obtained.

In short, the EHA, even as amended by the HCPA, does not authorize actions for fees by parents who prevail in EHA due process hearings. On the contrary, under the EHA even as amended, only a party aggrieved by an administrative decision may file a court action. As a result, the HCPA permits parents to recover fees for a due process hearing only if they (1) must litigate the merits of an EHA claim in a court action brought by a party aggrieved by an administrative decision and (2) prevail in that action.

II. THE *EN BANC* COURT'S INTERPRETATION OF THE LEGISLATIVE HISTORY SQUARELY CONFLICTS WITH *CREST STREET* AND IS WRONG.

This Court has ruled that, when the language of a statute is clear, it must be followed unless the legislative history demonstrates "a clearly expressed legislative intention to the contrary . . .." *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (internal quotation marks omitted).[7] In *Crest Street*, in turn, this Court gave some indication of the showing that is required to overcome the statutory language when it ruled that the legislative history of § 1988 did not establish that Congress intended to permit an action for fees alone. In so ruling, this Court emphasized that: (1) "the Senate Report cited cases that involved at a minimum the filing of a judicial complaint" on the merits, as did the House Report; and (2) "the legislative history is replete with references to 'the enforcement of the civil rights statutes in suits, through the courts and by judicial process.' " *Crest Street*, *supra*, 479 U.S. at 12-13

[7] As Justice Marshall, writing for a unanimous Court, added, "[u]nless exceptional circumstances dictate otherwise, when we find the terms of a statute unambiguous, judicial inquiry is complete." *Id.* at 461 (internal quotation marks and brackets omitted). Here, given *Crest Street's* construction of the phrase "action or proceeding to enforce," and the HCPA's use of the term "action or proceeding," when considered in context ("brought under this subsection" and "aggrieved parties"), the language of the HCPA should be regarded as unambiguous.

quoting Webb, supra, 471 U.S. at 241 n.16 (other citations and internal quotation marks omitted).

Like the legislative history found insufficient in *Crest Street* to establish a Congressional intent to create an action for fees alone, the legislative history of the HCPA in the Senate is also insufficient. Thus, when the legislative history of the HCPA is carefully examined, it reflects that the Senate intended to provide fees for due process hearings only when a parent must go to court to enforce the educational rights guaranteed by the EHA. Furthermore, although the House may have intended independent fee actions, based on its belief that *Carey* had ruled that Title VII permitted such actions, its intention cannot be controlling. First, the House's overriding purpose was to create a right to fees in circumstances permitted by other fee-shifting statutes. Second, as this Court has ruled, " '[t]he content of the law must depend upon the intent of both Houses, not of just one.' " *Department of the Air Force v. Rose*, 425 U.S. 352, 366 (1976), quoting K. Davis. Administrative Law Treatise § 3A.31 at 175 (1970 Supp.).[8]

A. The Senate.

The Senate Report here is remarkably similar to the Senate Report analyzed in *Crest Street*.[9] The report cites two deci-

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[8] In *Rose*, this Court was presented with conflicting legislative history in the House and the Senate over the scope of an exemption to the FOIA. In view of the general rule of the FOIA favoring disclosure, it ruled that an exemption could be no broader than that agreed to by both Houses of Congress. Here, as Congress is well aware, the American Rule generally barring fee awards is the norm, and to create an exception to that rule, both Houses must agree.

[9] The parts of the Senate Report relied on in this petition are from the "additional views" parts of the report. The main body of the report addressed a far different bill that was not enacted; and there has been no disagreement in this case that the "additional views" are the sections of the report that address the bill that was enacted.

isions of this Court, *Carey* and *Webb*, and distinguishes between them on the grounds that *Carey*, brought under Title VII, involved mandatory administrative proceedings, while *Webb*, brought under § 1983, did not. Significantly, however, as in *Crest Street*, both cases cited involved court actions on the merits. Furthermore, the report elsewhere strongly suggests that fee-shifting is permitted only when court action on the merits is necessary: "handicapped children should be provided fee awards on a basis similar to other fee shifting statutes *when securing the rights guaranteed to them by the EHA.*" S. Rep. No. 99-112 at 14, reprinted in 1986 U.S. Code Cong. & Admin. News at 1804 (emphasis added).[10]

The legislative history in the Senate is otherwise replete with references to suits by parents to enforce the educational rights of their children. Thus, at the outset of the 99th Congress, when Senator Weicker, the architect of the HCPA, introduced S. 415, a bill containing language virtually identical to that of the fee-shifting provision eventually enacted, he stated:

> . . . [T]he legislation I am introducing today is a specific response to the court's opinion in Smith versus Robinson. My amendment to Public Law 94-142 is for *the limited purpose of clarifying what I believe has always been, and continues to be, the intent of Congress: that reasonable attorneys' fees be available to parents of handicapped children who prevail in a civil court action to enforce their child's right to an education.*

131 Cong. Rec. S1980 (Feb. 6. 1985) (emphasis added).

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[10] See also S. Rep. No. 99-112 at 17, reprinted in 1986 U.S. Code Cong. & Admin. News at 1806 (additional views of seven Senators describing the HCPA's fee-shifting provision as permitting attorneys' fees "in *cases brought to court on behalf of the educational rights of handicapped children*") (emphasis added).

S. 415 was approved by the Senate in July, 1985, after a brief discussion. Senator Weicker opened the discussion by summarizing *Smith v. Robinson* as holding "contrary to the original intent of Congress, that Public Law 94-142 does not allow the award of attorney's fees to *parents who*, after exhausting administrative procedures, *prevail in a civil court action to protect their child's right to a free appropriate public education.*" 131 Cong. Rec. S21389 (July 30, 1985) (emphasis added). He added:

> Allowing *courts* to award attorney's fees to *prevailing plaintiffs* is not an unusual congressional remedy. In fact, . . . Congress has already enacted more [than] 130 fee shifting statutes which provide for the award of attorneys fees to *parties who prevail in court to obtain what is guaranteed to them by law.*

Id. at S21390 (emphasis added). S. 415, Senator Weicker stated, "will restore to parents of handicapped children the right to be awarded attorney fees . . . *when they must go to court to secure the educational rights promised to them by Congress.*" *Id.* (Emphasis added). The statements of the co-sponsors of the bill, except for Senator Simon, do not differ in any important respect from those of Senator Weicker.[11]

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[11] Senator Stafford ("This bill amends Public Law 94-142 . . . to make reasonable attorney's fees available to parents who *prevail in court actions filed under 94-142.*") (S21390) (emphasis added); Senator Hatch (describing S. 415 as a response to the ruling in *Smith v. Robinson* that parents may not receive fees "when they prevail in an *EHA civil action*") (S21390) (emphasis added); Senator Kennedy (criticizing *Smith v. Robinson* for denying fees to "*parents* of handicapped children *who prevail in a court case under Public Law 94-142*" and noting that bill "will clarify congressional intent by authorizing the award of attorneys fees at the discretion of the judge to *prevailing parents in Public Law 94-142 cases*") (S21391) (emphasis added); Senator Kerry (describing fee-shifting provision as permitting "attorneys' fee awards *in cases brought to court on behalf of the educational rights* of handicapped children") (S21391) (emphasis added).

By contrast, Senator Simon was the only Senator to suggest that S. 415 permitted an award of fees "in any action or proceeding brought *under this subpart*" and the only Senator to mention *Carey*, including its *dictum* about separate fee actions. (S21392) (emphasis added).

The Senate bill differed from the House bill in a number of respects, thereby necessitating a conference. Following the conference in 1986, Senator Weicker reiterated his understanding of the bill: "What we do here today is to make the Education of the Handicapped Act consistent with more than 130 other fee shifting statutes which provide for the award of attorneys' fees to parties *who prevail in court to obtain what is guaranteed to them by law.*" 132 Cong. Rec. S16822 (July 17, 1986) (emphasis added). No other Senator contradicted this interpretation of the Act. Indeed, Senator Simon noted that the problem addressed by the legislation was that the EHA "does not allow the award of attorneys' fees to parents *who prevail in court actions to protect the right of their child to a free appropriate education.*" *Id.* at S16825 (emphasis added).

Accordingly, when the legislative history in the Senate is examined, it does not establish "a clearly expressed legislative intention" to permit an action for fees alone. *Burlington Northern R. Co*, *supra*, 481 U.S. at 461. Instead, it establishes that the Senate intended to make the HCPA like Congress' other fee-shifting legislation; and, as Senator Weicker, the architect of the HCPA, repeatedly affirmed, the legislation — like other fee-shifting statutes — would authorize fees when civil rights litigants must go to court to enforce their substantive rights. The other Senators who spoke (excepting Senator Simon in 1985) consistently with the *holding* of *Carey*, referred to fee awards to parents who must go to court to secure the rights afforded by the EHA. These repeated statements cannot reasonably be construed as merely one application of S. 415. No Senator, hearing or reading these statements, could reasonably have interpreted them as describing a measure that would permit fees, not only to parents who must go to court to secure their children's educational rights, but also to parents who need *not* go to court to do so.

B. The House.

In 1985, the House Report expressly adopted the *Carey dictum* that there could be an independent fee action and floor manager Williams defined "proceeding" in the fee-shifting provision in the House bill as meaning administrative proceeding. See App. 16a, 48a-49a, 50a. In 1986, moreover, after the conference, two opponents of an independent fee action stated that it had been authorized by the conference bill. See App. 54a. However, in the 1986 House floor debates, floor manager Williams did not confirm his 1985 interpretation of the legislation. Instead, he told his colleagues:

> The right to reimbursement of reasonable attorneys' fees provided for in the conference report is exactly the same right that Congress has extended to other persons protected by fees statutes — *no more and no less.*
>
> Thus, this conference report places handicapped children in the *same position* as others.

132 Cong. Rec. H17608 (July 24, 1986) (emphasis added). Furthermore, and in contrast to the 1985 House Report, floor manager Williams stated that "determinations as to whether a parent is awarded fees and the amount of the award are governed by applicable decisions interpreting 42 U.S.C. 1988." *Id.*

* * *

In short, the *en banc* opinion is wrong in concluding that the legislative history demonstrates that Congress intended an independent fee action. Insofar as the Senate is concerned, the opinion rests solely on an utterly unwarranted assumption that the reference in the Senate Report to *Carey* was necessarily an endorsement of its *dictum*, rather than its holding, and on a statement by Senator Simon in 1985; and it overlooks the otherwise overwhelming evidence, even from Senator Simon in 1986, that the Senate intended fee

awards to be made only when parents must go to court to vindicate the educational rights granted by the EHA. Insofar as the House is concerned, the *en banc* opinion overlooks the fact that its overriding purpose was to provide fee awards in the HCPA in circumstances permitted in other fee-shifting statutes.

III. OTHER CONSIDERATIONS.

There are two other reasons that support review of the *en banc* opinion here. First, although there is no conflict among the circuits over whether the HCPA creates an independent fee action, their rationales for carving out an unprecedented exception to the American Rule on fee awards are utterly at odds with each other and with this Court's canons of statutory construction. Second, in EHA cases not involving fee awards, the courts of appeals have squarely ruled that the EHA permits only a party aggrieved by a decision at the administrative level to bring a civil action. The existence of these conflicts is a further indication that review by this Court is necessary to ensure a correct and uniform construction of the EHA, as amended by the HCPA.

A. Other Fee Decisions.

Petitioners acknowledge that four other courts of appeals have ruled that the HCPA permits an independent action for fees. *See Eggers v. Bullitt County School District*, 854 F.2d 892 (6th Cir. 1988); *Duane M. v. Orleans Parish School Board*, 861 F.2d 115 (5th Cir. 1988); *Mitten v. Muscogee County School District*, 877 F.2d 932 (11th Cir. 1989), *cert. denied*, No. 89-905, 110 S. Ct. 1117 (1990); and *McSomebodies v. Burlingame Elementary School District*, 886 F.2d 1558 (9th Cir. 1989), together with *McSomebodies v. San Mateo City School District*, 886 F.2d 1559 (9th Cir. 1989), *as supplemented*, 897 F.2d 974 (1990).[12] Despite the unanimity of

[12] In addition, *Duane M.* was followed in *Shelly C. v. Venus Independent School District*, 878 F.2d 862 (5th Cir.1989), *cert. denied*, No. 89-788, 110 S. Ct. 729 (1990).

the result, the rationales of these courts are in conflict with each other and with this Court's pronouncements in important respects. The existence of these conflicts is strong proof that the now-uniform result is wrong.

Thus, in *Duane M.*, the Fifth Circuit, unlike the *en banc* opinion here, ruled that "[t]he HCPA does not expressly confer upon prevailing parties at the administrative level a right to bring a separate action solely in order to recover attorneys' fees . . .." 861 F.2d at 118. In addition, in *Eggers*, the Sixth Circuit suggested that the HCPA grants hearing officers the power to award attorneys' fees.[13] This interpretation of the HCPA is directly in conflict with the position taken by the *en banc* opinion here; it is also plainly wrong.

The opinions of other courts of appeals permitting an action for fees alone are flawed in other respects. Not only do they fail to examine carefully the language of the HCPA and ignore the teaching of *Crest Street*, but they also fail to recognize the independent significance of the Senate and the House and the substantial differences in the legislative history of the HCPA in the Senate and the House. As a consequence, these courts (except for the Fifth Circuit in *Duane M.*) have failed to understand that the HCPA does not expressly authorize court actions for fees alone; and they have placed undue weight on the evidence of legislative intent in the House in 1985.

In *Eggers*, for example, the Sixth Circuit, in construing the phrase, "action or proceeding," in the fee-shifting provision, relied heavily on *Carey's* emphasis on mandatory administrative proceedings. However, this Court declined

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[13] According to the Sixth Circuit, "the language of the Act permits the administrative officer to refuse to order an award of attorney's fees and we have difficulty grasping how one can refuse to award something he or she couldn't award in the first place." *Eggers*, *supra*, 854 F.2d at 895-96 (internal quotations omitted).

to base its ruling in *Crest Street* on this distinction.[14] In addition, the Sixth Circuit found *Carey's dictum* "persuasive" even though it recognized that this language was *dictum* and that this *dictum* had been disavowed by this Court in *Crest Street*. *Eggers*, *supra*, 854 F.2d at 895. Furthermore, although the Sixth Circuit noted that the HCPA permits a civil action to be brought only by a party aggrieved, it failed to analyze that provision and to recognize its significance. Finally, like the *en banc* opinion here, the Sixth Circuit, in analyzing the legislative history in the Senate, relied exclusively on Senator Simon's 1985 remarks about *Carey* and the comparison of *Carey* and *Webb* in the Senate Report. It thus failed to appreciate that the legislative history in the Senate — when examined in its entirety — demonstrates an intention to permit recovery of fees for administrative proceedings only when a parent is compelled to enforce EHA rights in court.

Duane M. is flawed in a different respect. Like the *en banc* opinion here, it reads into the offer-of-settlement provision of the HCPA an affirmative implication that is simply unwarranted. In the Fifth Circuit's view, the fact that attorneys' fees may be denied because parents reject a settlement offer before a due process hearing helps to establish that an action may be brought solely for the purpose of securing fees. *Duane M.*, *supra*, 861 F.2d at 119. This view is wrong. Thus, although parents who reject a pre-hearing settlement offer should be denied fees when the relief they finally obtain *in court* is no more favorable than the settlement offer, this fact does not establish their entitlement to fees for the administrative process when they need not go to court to secure their child's educational rights.

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[14] Indeed, as Justice Brennan observed in *Crest Street*, the result in *Crest Street* is not dependent on whether the administrative proceeding is "mandatory or optional, . . . integral or peripheral to an enforcement scheme." 479 U.S. at 22 (Brennan, J., dissenting).

The analyses in the other cases are even more wanting. In *Mitten*, the Eleventh Circuit simply asserted that "[t]he term 'action or proceeding' under the Act includes administrative hearings and appeals." 877 F.2d at 935. In addition, it erroneously refused to recognize that EHA administrative proceedings are brought under subsections (b) and (c) of § 1415, not subsection (e), and therefore wrongly concluded that the language of the fee-shifting provision, § 1415(e)(4)(B) — " 'any action or proceeding brought under this subsection' " — refers to administrative proceedings. *Id.* Finally, the *McSomebodies* cases contain no analysis whatsoever.

B. Other EHA Cases.

In EHA cases not involving attorneys' fees, courts have squarely ruled that EHA actions may be brought only by a "party aggrieved by the findings and decision" entered at the administrative level and that courts have jurisdiction only of an action brought by such an aggrieved party. Thus, in *Robinson v. Pinderhughes*, 810 F.2d 1270 (4th Cir. 1987), the court affirmed the dismissal of an EHA claim brought by the parents of a handicapped child who had prevailed in a due process hearing and who sought to compel the school system to comply with the decision. Despite the school system's noncompliance, the court ruled that "the plaintiffs had neither the responsibility nor the right to appeal the favorable decision by the local hearing officer since they were not aggrieved by his decision." *Id.* at 1272. Because the parents were "not parties aggrieved . . . the statute does not provide for their access to either the state or federal courts."[15] *Id.* at 1275. Other courts also have ruled that only

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[15] At the same time however, the court also ruled, pursuant to *Maine v. Thiboutot*, 448 U.S. 1 (1980), that the parents could pursue an enforcement action under § 1983 for vindication of the EHA's " 'enforceable substantive right to a free appropriate public education.' " *Id.* at 1274, quoting *Smith v. Robinson*, *supra*, 468 U.S. at 1010. In such an action, § 1988 is the provision governing an award of attorneys' fees.

parties aggrieved by administrative decisions may bring EHA actions in court. *See, e.g., Crocker v. Tennessee Secondary School Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989) (where, despite *Eggers*, the court observed that "[o]nly parties 'aggrieved' by the results of the administrative process are granted a right of action in . . . court" and that it could "not imagine any other reading of the statute"); *Digre v. Roseville Schools Independent District No. 623*, 841 F.2d 245, 247, 249 (8th Cir. 1988) (same); *Antkowiak v. Ambach*, 838 F.2d 635, 641 (2d Cir.) (same), *cert. denied sub nom., Doe v. Sobol*, 488 U.S. 850 (1988).

The fact that the courts of appeals in non-fee cases interpret the language of the EHA, as amended by the the HCPA, to permit civil actions only by parties aggrieved by a decision at the administrative level suggests that the conflicting construction of the legislation in the fee cases is wrong. It also demonstrates the need for review by this Court to ensure a proper and uniform construction of this important legislation.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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90-461

No. 89-

In The

Supreme Court of the United States

OCTOBER TERM, 1989

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

LANI MOORE, *et al.*,
Respondents.

Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued *En Banc* May 9, 1990 Decided June 19, 1990

No. 88-7003

LANI MOORE, *et al.*

v.

DISTRICT OF COLUMBIA, *et al.*,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 87-00941)

Donna M. Murasky, Assistant Corporation Counsel, with whom *Herbert O. Reid, Sr.,* Corporation Counsel, and *Charles L. Reischel,* Deputy Corporation Counsel, were on the brief, for appellants. *Frederick D. Cooke, Jr.,* Attorney, Office of the Corporation Counsel, also entered an appearance for appellants.

David A. Strauss, with whom *Matthew B. Bogin, Michael J. Eig* and *Margaret A. Kohn* were on the brief, for appellees.

Paul Weckstein, Kathleen Boundy and *Shelly R. Jackson* were on the brief for *amicus curiae* Senators *Tom Harkin, James M. Jeffords, Edward M. Kennedy, John F. Kerry, Paul Simon,* former Senator *Lowell P. Weicker, Jr.,* and Representatives *Augustus Hawkins, Major R. Owens* and *Pat Williams.*

William H. Lewis, Jr., and *Hunter L. Prillaman* were on the brief for *amicus curiae,* For Love of Children, Inc.

Before: WALD, *Chief Judge,* MIKVA, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, and THOMAS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: The issue in this case is whether the Handicapped Children's Protection Act ("HCPA"), 20 U.S.C. § 1415(e)(4)-(f) (1988), authorizes a court to award attorney fees to a party who has prevailed in an administrative proceeding under the Education of the Handicapped Act ("EHA"), 20 U.S.C. §§ 1400-1485 (1988). In an action before the District Court, the appellees, several handicapped children and their parents (collectively "Moore"), were awarded fees incurred in their successful administrative proceedings against the appellant, District of Columbia ("D.C."). *See Moore v. District of Columbia,* 666 F. Supp. 263 (D.D.C. 1987). On appeal, a divided panel of the court reversed. *See Moore v. District of Columbia,* 886 F.2d 335 (D.C. Cir. 1989). Moore then filed a suggestion for *en banc* consideration, and the court decided to rehear the case. We now affirm.

In upholding the judgment of the District Court, we join the four circuit courts that have addressed the question in concluding that HCPA *does* authorize an award of attorney fees to a parent who prevails in EHA administrative proceedings. *See McSomebodies v. Burlingame Elementary School,* 897 F.2d 974 (9th Cir. 1989) (as supplemented Mar. 2, 1990); *Mitten v. Muscogee County School Dist.,* 877 F.2d 932 (11th Cir. 1989), *cert. denied,* 110 S. Ct. 1117 (1990); *Duane M. v. Orleans Parish School*

Bd., 861 F.2d 115 (5th Cir. 1988); *Eggers v. Bullit County School Dist.*, 854 F.2d 892, 898 (6th Cir. 1988); *see also Counsel v. Dow*, 849 F.2d 731, 740 n.9 (2d Cir.) (dictum), *cert. denied*, 109 S. Ct. 391 (1988); *Arons v. New Jersey State Bd.*, 842 F.2d 58, 62 (3d Cir.) (dictum), *cert. denied*, 109 S. Ct. 366 (1988). Accordingly, we vacate the decision of the panel; we also affirm the judgment of the District Court insofar as it holds that Moore is entitled to an award of fees under HCPA.

I. Background

EHA conditions federal funds for state special education programs on the development of a state "policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). To guarantee that the policy is faithfully administered, EHA requires states to afford handicapped children and their parents various "procedural safeguards." *Id.* § 1415(a). Included among these procedural safeguards are notice of proposed individualized education programs, *see id.* § 1415(b)(1)(C); "an opportunity to present complaints with respect to" such programs, *id.* § 1415(b)(1)(E); "an impartial due process hearing" when such complaints are made, *id.* § 1415(b)(2); and state agency review of the outcome of any due process hearing, *see id.* § 1415(c). *See generally Honig v. Doe*, 484 U.S. 305, 309-12 (1988). In addition, during the course of any administrative proceeding, handicapped children and their parents have "the right to be accompanied and advised by counsel." 20 U.S.C. § 1415(d)(1). "[A]ny party aggrieved" by the final outcome of the administrative process may seek judicial review by filing an action in state court or federal district court. *Id.* § 1415(e)(2).

As initially enacted, EHA did not provide for recovery of attorney fees. In *Smith v. Robinson*, 468 U.S. 992 (1984), the Supreme Court held that EHA furnished the exclusive remedy for various kinds of challenges to state special education programs, thereby foreclosing joinder of

claims based on statutes authorizing recovery of attorney fees. *See id.* at 1006-21. Congress responded by enacting HCPA, Pub. L. No. 99-372, 100 Stat. 796 (1986). Among other things, HCPA provides:

> In any action or proceeding brought under this subsection, the court in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

20 U.S.C. § 1415(e)(4)(B).[1]

The question posed by this suit is whether HCPA authorizes a court to award fees to a parent[2] who prevails in administrative proceedings required by EHA. After securing an order of special education placement in an administrative proceeding against D.C., Moore filed an action in the District Court seeking to recover her attorney fees under section 1415(e)(4)(B). The trial judge concluded that HCPA authorized an award of fees to Moore, 666 F. Supp. at 265-66, and such an award was granted. D.C. appealed to this court, arguing that HCPA authorizes the recovery of attorney fees only if the parent *loses* at the administrative level and then successfully challenges the administrative determination in court. D.C. also challenged the size of the District Court's fee award as unreasonable. A divided panel reversed, *see* 886 F.2d at 337-50, and Moore then sought *en banc* consideration. The court subsequently decided to rehear the case *en banc* to consider whether HCPA authorizes a court to award attorney fees to a party who prevails in an administrative proceeding under EHA.

II. Analysis

This case turns on a straightforward issue of statutory

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[1]HCPA also nullifies the holding in *Smith* that EHA furnishes the exclusive remedy for claims within its scope. *See id.* § 1415(f).

[2]We use the term "parent" to refer to either the parent or the guardian of a handicapped child.

construction: does HCPA authorize recovery of fees when a parent prevails in an EHA administrative proceeding or only when the parent *loses* in such a proceeding and then prevails in a civil action attacking the adverse administrative determination? This is not a question of first impression in the federal system. Relying on the text and legislative history of HCPA, the four circuit courts of appeals to address the matter have unanimously concluded that parents who prevail at the administrative stage *are* entitled to recover their fees under section 1415(e)(4)(B). *See McSomebodies v. Burlingame Elementary School,* 897 F.2d 974 (9th Cir. 1989) (as supplemented Mar. 2, 1990); *Mitten v. Muscogee County School Dist.,* 877 F.2d 932 (11th Cir. 1989), *cert. denied,* 110 S. Ct. 1117 (1990); *Duane M. v. Orleans Parish School Bd.,* 861 F.2d 115 (5th Cir. 1988); *Eggers v. Bullit County School Dist.,* 854 F.2d 892, 898 (6th Cir. 1988); *see also Counsel v. Dow,* 849 F.2d 731, 740 n.9 (2d Cir.) (dictum), *cert. denied,* 109 S. Ct. 391 (1988); *Arons v. New Jersey State Bd.,* 842 F.2d 58, 62 (3d Cir.) (dictum), *cert. denied,* 109 S. Ct. 366 (1988).[3] We find the reasoning of our sister circuits persuasive.

A. *Statutory Text*

We begin, as we must, with an examination of the statutory text. *See, e.g., United States v. Bass,* 404 U.S. 336, 339 (1971). In our view, construing HCPA to authorize recovery of fees by a parent who prevails in EHA administrative proceedings best comports with "the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier,*

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[3]For commentary reaching the same conclusion, see Schreck, *Attorneys' Fees for Administrative Proceedings under the Education of the Handicapped Act: of* Carey, Crest Street *and Congressional Intent,* 60 TEMP. L.Q. 599 (1987).

Inc., 486 U.S. 281, 291 (1988).

1. *The Statutory Reference to "In any action or proceeding"*

HCPA provides that a court may award attorney fees "[i]n any *action or proceeding* brought under this subsection." 20 U.S.C. § 1415(e)(4)(B) (emphasis added). We are at a loss to give meaning to the distinction between "action" and "proceeding" short of inferring that Congress meant to authorize fees for parents who prevail either in a *civil action* or in an *administrative proceeding* under EHA. It is true that the phrase "action or proceeding" need not invariably refer to the distinction between civil actions and administrative proceedings wherever that phrase appears in the legal universe. But in the *particular* statutory context that gives meaning to the words of HCPA, we find this to be the most natural reading.[4] Administrative proceedings occupy a central place in the remedial framework established by EHA. *See generally Honig*, 484 U.S. at 311-12. Indeed, EHA and HCPA unambiguously use the terms "action" and "proceeding" in several places to distinguish between the administrative and judicial phases of EHA litigation. *See* 20 U.S.C. § 1415(e)(2) (authorizing "civil action" in state or federal court and requiring that "[i]n any *action* . . . the court shall receive the records of the administrative *proceedings* . . . ." (emphasis added)); *id.* § 1415(e)(4)(D) (using "action or proceeding" and then drawing parallel distinctions between civil actions governed by the Federal Rules of Civil Procedure and "administrative proceedings" and between "court" and "administrative officer"). "[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

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[4] Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . .

NLRB v. Federbrush Co., 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.), *quoted in Shell Oil Co. v. Iowa Dep't of Revenue*, 109 S. Ct. 278, 281 n.6 (1988).

The contemporaneous judicial construction of the phrase "action or proceeding" in another fee-shifting statute likewise suggests that HCPA was intended to permit recovery of fees by a parent who prevails at the administrative stage. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980). The issue in *Gaslight* was whether section 706(k) of the Civil Rights Act of 1964 permitted a party to bring suit in federal court to recover fees incurred in necessary state administrative and judicial proceedings under Title VII. Section 706(k) provides that "[i]n any action or proceeding under this subchapter [Title VII] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee. . . ." 42 U.S.C. § 2000e-5(k) (1982) (emphasis added). The Court held that

> [t]he words of § 706(k) leave little doubt that fee awards are authorized for legal work done in "proceedings" other than court actions. Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings.

447 U.S. at 61. The Court expressly rejected the claim that section 706(k) authorizes fee-shifting only when "the complainant ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees":

> It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level. Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, *we must conclude that [Title VII's] authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.*

Id. at 66 (emphasis added).

Gaslight constituted part of the "contemporary legal context" in which Congress enacted HCPA. *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979). As we discuss below, the legislative history of HCPA reveals that Congress consciously drafted the statute to incorporate *Gaslight*'s reading of section 706(k). *See* Part II.B.1-2 *infra*. But even without the benefit of this extrinsic aid to construction, it would be both "appropriate [and] ... realistic *to presume* that Congress was thoroughly familiar with" the Court's decision in *Gaslight* "and that it expected its enactment to be interpreted in conformity with" that precedent. *Cannon*, 441 U.S. at 699 (emphasis added).

By the same token, judicial constructions that *postdate* enactment of HCPA are less relevant for inferring Congress' intentions. D.C. draws our attention to *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6 (1986). In *Crest Street*, the Court held the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982),[5] did not create a right to sue for fees incurred in administrative proceedings initiated to block a proposed highway construction project under Title VI of the Civil Rights Act of 1964. The Court reasoned that this suit did not constitute an "*action or proceeding to enforce* the civil rights laws listed" in section 1988. *Id.* at 12 (emphasis supplied by Court). The Court also discounted the suggestion that it would be "anomalous" under section 1988 to award fees to parties who prevail in civil litigation while denying fees to those who prevail in administrative proceedings. *See id.* at 13-14.

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[5] In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id.

It is unnecessary for us to address whether the reasoning in *Crest Street* and *Gaslight* can be reconciled.[6] For no matter how much *Crest Street* diminishes the authority of *Gaslight* as *a judicial precedent,* it cannot diminish *Gaslight*'s significance as *evidence of Congress' intention* in using the phrase "action or proceeding" in HCPA. *See Cannon,* 441 U.S. at 699 (construing statute in light of more generous implied-cause-of-action precedent overruled only after statute's enactment); *accord Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 381-82 (1982). At the time that HCPA was enacted, *Gaslight* was *reasonably* assumed to be good law,[7] and even if *Crest Street* is viewed as undermining that assumption, "we could not, in reason, interpret the statute[ ] [before us] as though the assumption never existed." *Welch v. Texas Dep't of Highways & Pub. Transp.,* 483 U.S. 468, 496 (1987) (Scalia, J., concurring). Insofar as *Gaslight* construed the phrase "in any action or proceeding" to authorize recovery of fees by a party who prevails at the administrative level, we impute to Congress an intention that the phrase be likewise construed in HCPA.

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[6]The one circuit court of appeals to address the issue has held that *Gaslight*'s construction of section 706(k) survives *Crest Street*'s construction of section 1988. *See Jones v. American State Bank,* 857 F.2d 494, 496-98, 498 n.10 (8th Cir. 1988); *cf. Ball v. Abbott Advertising, Inc.,* 864 F.2d 419, 420 (6th Cir. 1988) (acknowledging issue without resolving it). The Fifth Circuit, *see Duane M.,* 861 F.2d at 118-19, and Sixth Circuit, *see Eggers,* 854 F.2d at 895, have reconciled the decisions in the context of HCPA, finding HCPA to be closer to section 706(k) than section 1988 in all relevant respects.

[7]*See White v. New Hampshire Dep't of Employment Sec.,* 455 U.S. 445, 451 n.13 (1982) (noting with approval reasoning of *Gaslight*); Schreck, *supra* note 3, at 659 (noting that it was "entirely reasonable" to rely on *Gaslight* before *Crest Street* was decided); *cf.* Eskridge, *Overruling Statutory Precedents,* 76 GEO. L.J. 1361, 1435 (1988) (suggesting *Crest Street* broke sharply with rationale of *Gaslight*).

2. *Section 1415(e)(4)(D)*

Construing HCPA to authorize recovery of attorney fees by a parent who prevails at the administrative level is also the only way reasonably to make sense of the role that HCPA assigns the state administrative officer. The pertinent provision in the statute provides that:

> No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—
>
> (i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure *or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins*;
>
> (ii) the offer is not accepted within ten days; and
>
> (iii) the court *or administrative officer finds that the relief finally obtained* by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

20 U.S.C. § 1415(e)(4)(D) (emphasis added). Because an administrative officer would have occasion to make the comparative finding required by section 1415(e)(4)(D)(iii) only in the event that the parent achieves "final[ ]" relief in an administrative proceeding, HCPA clearly contemplates that the issue of attorney fees will survive an otherwise successful outcome for the parent at the administrative stage.[8]

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[8]It is undisputed that HCPA permits only a court to award fees. *See* 20 U.S.C. § 1415(e)(4)(B) ("In any action or proceeding brought under this subsection, *the court* . . . may award reasonable attorneys' fees . . . ." (emphasis added)); *see also* S. REP. No. 112, 99th Cong., 1st Sess. 14 (1985) ("The committee intends that [the HCPA bill] will allow the Court, but not the hearing officer, to award fees . . . .").

D.C. suggests a different interpretation. It contends that section 1415(e)(4)(D) envisions a situation in which a parent rejects a settlement offer by a school district, loses at the administrative level, but then prevails in a civil action challenging the adverse administrative determination on the merits. In that case, D.C. argues, the court might remand the case to the administrative officer to determine whether the relief obtained in court is more favorable to the parent then was the rejected settlement offer.

We find this construction unpersuasive. In addition to being procedurally counterintuitive,[9] D.C.'s interpretation cannot be reconciled with *the timing provisions* of section 1415(e)(4)(D)(i). When the "relief finally obtained" is awarded *in court,* only the ten-day pretrial limit "prescribed by Rule 68 of the Federal Rules of Civil Procedure" is relevant.[10] If a parent were entitled to fees *only* upon prevailing in court, however, the independent ten-day limit applicable "in the case of an administrative proceeding" would be meaningless, for all settlement offers made more than ten days before the administrative proceeding are necessarily made more than ten days before any civil review action. The only circumstance in

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[9]In cases in which the court fashions a remedy for a handicapped child denied appropriate educational placement, the court will certainly be more familiar with the nature of the remedy than would be the administrative officer. It is extremely unlikely, then, that the court would seek the benefit of the administrative officer's views on the relative benefits of such a remedy and a rejected settlement offer.

[10]At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued.... If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

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which the ten-day time limit applicable to administrative proceedings becomes relevant is when the "relief finally obtained" is awarded *in the administrative proceeding.* For this reason, section 1415(e)(4)(D)(i) must presuppose that a parent who prevails at the administrative stage is otherwise eligible to recover his attorney fees.

3. *HCPA § 4*

Further evidence of Congressional intent may be gleaned from the provision in HCPA authorizing the Government Accounting Office ("GAO") to conduct a "study of the impact of" attorney fees on EHA practice. Pub. L. No. 99-372, § 4(a), 100 Stat. 797 (uncodified). The study is to identify, *inter alia,* "[t]he number[ ] ... of written decisions under sections [1415](b)(2) and (c)" -- the EHA due process hearing and administrative appeals provisions — as well as "the prevailing party in each such decision." *Id.* § 4(b)(1). It would be difficult — although, with sufficient imagination, not impossible — to explain how this information would be relevant to the study were the prevailing parties in these administrative proceedings not entitled to recovery of their fees. Consequently, we view section 4 of HCPA as further evidence that Congress envisioned recovery of fees by parents who prevail at the administrative stage.

4. *The Statutory Reference to "under this subsection"*

In an effort to overcome the foregoing evidence of Congress' intent to authorize fees for a parent who prevails in an administrative proceeding under EHA, D.C. points to the language in section 1415(e)(4)(B) that says fees are available "in an[ ] action or proceeding *brought under this subsection.*" 20 U.S.C. § 1415(e)(4)(B) (emphasis added). Section 1415(e)(2) authorizes a civil cause of action by "[a]ny party aggrieved by the findings and decision" of an EHA administrative decisionmaker.[11] According to D.C.,

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[11] Any party aggrieved by the findings and decision made [in an EHA administrative proceeding] ... shall have the right to bring a civil action with respect to the com-

the phrase "under this subsection" in section 1415(e)(4)(B) must be read to refer to section 1415(e)(2), thereby limiting a court's authority to award fees to cases in which a parent challenges an adverse administrative determination on the merits. We disagree.

It is by no means necessary to read the phrase "under this subsection" to refer to section 1415(e)(2). A suit to recover fees *directly* under section 1415(e)(4) is as much a suit "under" subsection 1415(e) as is a suit challenging an adverse administrative determination under section 1415(e)(2). Nor does anything in the text of EHA indicate that section 1415(e)(2) provides the *exclusive* judicial remedy under subsection 1415(e).[12]

Indeed, the text and structure of HCPA directly support the inference that Congress intended section 1415(e)(4) to provide an independent cause of action for fees. Like section 1415(e)(2), section 1415(e)(4) provides that "[t]he district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy." 20 U.S.C. § 1415(e)(4)(A). If Congress had not intended that parents

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> plaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(e)(2).

[12]It is clear that section 1415(e)(2) furnishes the exclusive judicial remedy—under the EHA, *see* 20 U.S.C. § 1415(f)—for attacking *the merits* of an administrative decision. But to suggest for this reason that section 1415(e)(2) is the exclusive judicial remedy under subsection 1415(e) merely begs the question of whether Congress intended section 1415(e)(4) to support an independent action for fees.

be able to sue for fees under section 1415(e)(4) independently of bringing a section 1415(e)(2) review action, this separate "amount in controversy" waiver would have been unnecessary.[13] Likewise, if Congress had not intended section 1415(e)(4) to furnish an independent cause of action, it seems doubtful that it would have directed the GAO to report separately "[t]he number ... of civil actions *brought under section [1415](e)(2),*" Pub. L. No. 99-372, § 4(b)(2), 100 Stat. 797 (uncodified) (emphasis added), and "the specific amount of attorneys' fees, costs and expenses awarded to the prevailing party, *in each action and proceeding under section [1415](e)(4),*" *id.* § 4(b)(3) (emphasis added).

The most that D.C.'s argument shows is that Congress could have spoken more precisely, using the word "subsubsection" or "subpart" or "paragraph" instead of "subsection" in section 1415(e)(4)(B). In at least one other place in HCPA, Congress clearly makes the same "mistake." *See* 20 U.S.C. § 1415(f) (referring to section 1415(b)(2) as a "subsection[ ]"). This phraseological nicety — which, by itself, proves nothing — cannot be permitted to trump the numerous compelling textual indications of Congress' intention to authorize recovery of fees by a parent who prevails in EHA administrative proceedings.

B. *Legislative History*

As we have explained, we believe that allowing a parent who prevails at the administrative stage to sue for attorney fees best comports with the text and structure of HCPA considered as a whole. But insofar as "the language of the statute does not make [Congress' intention] *crystal clear,*" we turn to the "legislative history to

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[13]The independent waiver was part of the original EHA statute. *See* 20 U.S.C. § 1415(e)(4)(1982). But rather than delete this provision as superflous, Congress renumbered paragraph (e)(4) as (e)(4)(A) and incorporated the provision in HCPA, *see* Pub. L. No. 99-372, § 2, 100 Stat. 796, reinforcing the inference that the retention of both waivers was deliberate and intended to have substantive consequences.

determine whether . . . Congress intended that the statute apply to the particular cases in question." *Allen v. State Bd. of Elections,* 393 U.S. 544, 570 (1969) (emphasis added). The legislative history, we find, gives firm support to the view of the statute espoused by Moore.

D.C. opposes our reliance on legislative history. It notes that, under the "American Rule," parties are presumed to be responsible for their own attorney fees. Consequently, D.C. maintains, any textual ambiguities in the statute must be resolved *against* recovery of fees. At a minimum, D.C. argues, in the absence of clear textual authorization, a finding that a statute authorizes fee shifting in a particular situation must be supported by an exceptionally clear showing in the legislative history.

We believe that D.C.'s argument mischaracterizes the applicability of the American Rule. Under existing precedent, this background norm of interpretation holds merely that a court may not *imply* authorization for fee shifting in the face of *statutory silence. See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247-68 (1975). The Supreme Court has never suggested that the American Rule displaces ordinary principles of statutory construction when the scope of an *express* fee-shifting provision is arguably ambiguous. The only objective in such a situation is to determine what "Congress intended," *Pennsylvania v. Delaware Valley Citizens' Council,* 478 U.S. 546, 559 (1986), and for that purpose the Court has repeatedly consulted legislative history without any indication that authorization for fees depends on some heightened showing of congressional approval. *See, e.g., id.* at 559-60; *Crest Street,* 479 U.S. at 12-13; *Gaslight,* 447 U.S. at 63. In this case, an inquiry into the legislative history removes any doubt that Congress intended parents who prevail in EHA administrative proceedings to be able to recover their attorney fees.

1. *House of Representatives*

D.C. does not dispute that the House of Representatives expressly contemplated that HCPA would authorize

recovery of fees by a parent who prevails at the administrative level. As originally introduced in the House, HCPA provided for the recovery of attorney fees only in "an[ ] *action* brought under this subsection." H.R. 1523, 99th Cong., 1st Sess. § 2 (1985) (emphasis added). Over the opposition of Representatives who preferred that recovery of fees be permitted only "if it becomes necessary . . . to bring [a matter] to the courts," *Transcript of the House Committee on Education and Labor Markup of the Handicapped Children's Protection Act of 1985 (H.R. 1523)*, 99th Cong., 1st Sess. 171 (Sept. 11, 1985) (statement of Rep. Jeffords), the bill was amended in markup to add the words "or proceeding." As explained in the report accompanying the bill, the committee relied on *Gaslight* in concluding that the addition of this language would extend eligibility for fees to parents who prevail at the administrative level:

> The "action or proceeding" language in section 2 of the bill is identical to the language in title VII of the Civil Rights Act of 1964, interpreted by the Supreme Court in *New York Gaslight Club v. Carey*. In *Gaslight*, the Court held that the use of the phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorneys' fees, expenses and costs incurred in court. *The Court's decision also established a similar right under title VII to obtain an award of fees, costs, and expenses incurred in mandatory state and local administrative proceedings, even where no lawsuit is filed.*
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> . . . .
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> . . . [I]f a parent prevails on the merits at an administrative proceeding (and the agency does not appeal the decision), the parent may be awarded reasonable attorneys' fees . . . .

H. R. REP. No. 296, 99th Cong., 1st Sess. 5 (1985) (citation omitted) (emphasis added).

2. *The Senate*

Proceedings in the Senate reflect a similar understanding. The Committee on Labor and Human Resources ini-

tially reported a complicated measure requiring, *inter alia*, that a school pay for an attorney to represent a handicapped child and his parents whenever the school itself is represented by counsel in EHA administrative proceedings. *See* S. REP. No. 112, 99th Cong., 1st Sess. 8 (1985) [hereinafter S. REP. No. 112]. However, the Senate report also contained the "additional views" of twelve senators favoring a substitute bill that used the "action or proceeding" formula ultimately adopted by the full Senate. Like their House counterparts, these Senators expressed their understanding that this language would have the same effect as the language construed in *Gaslight*:

> The committee . . . intends that [the attorney fee provision] should be interpreted consistent with fee provisions of statutes such as title VII of the Civil Rights Act of 1964 which authorizes courts to award fees for time spent by counsel in mandatory administrative proceedings under those statutes. *See New York Gaslight Club, Inc. v. Carey* (compare *Webb v. Board of Education for Dyer County*, in which the court declined to award fees for work done at the administrative level because the statute under which the suit was brought did not require the exhaustion of administrative remedies prior to going to court).

Id. at 14 (citations omitted).

D.C. characterizes this passage as "ambiguous," suggesting that the report may have been referring to *Gaslight* merely to suggest that a party should be able to recover fees *incurred* in necessary administrative proceedings *if* the parent prevails in a civil action. We find this reasoning strained. *Gaslight* unambiguously concluded *both* that section 706(k) authorizes recovery of fees incurred in necessary administrative proceedings *and* that a party who prevails at that level can sue for fees. Indeed, the Court inferred that Congress intended to authorize fees for the prevailing party in administrative proceedings precisely *because* availing oneself of available administrative remedies is necessary under Title VII. *See* 447 U.S.

at 65-66; *see also Duane M.*, 861 F.2d at 118 (distinguishing *Crest Street* on this ground); *Eggers*, 854 F.2d at 895 (same).[14]

D.C. also suggests that floor debate in the Senate evidences disagreement about whether HCPA authorizes fees for parents who prevail at the administrative level. It is well established that the remarks of individual congressmen on the floor are entitled to less weight than are committee reports. *See, e.g., United States v. International Union United Auto., Aircraft & Agricultural Implement Workers*, 352 U.S. 567, 585 (1957). But, in any event, we do not view the statements to which D.C. refers as conflicting with the report of the Labor and Human Resource Committee.

The only Senator to address the question during the floor debate unequivocally indicated that parents would be able to recover fees after prevailing at the administrative level. Senator Simon explained that the bill had been drafted with the Court's analysis in *Gaslight* in mind:

> The language of S. 415, which permits the award of a reasonable attorney fee in any action or proceeding brought under this subpart, is identical to the language of title VII of the Civil Rights Act of 1964, interpreted by the Supreme Court in *New York Gaslight Club v. Carey*. The Court stated:

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[14]D.C. also suggests that insofar as the Senate expressed its intention that courts construe HCPA "consistent" with other fee-shifting statutes, it is appropriate to construe HCPA consistently with the Court's subsequent interpretation of 42 U.S.C. § 1988 in *Crest Street*. The Senate report, however, states that HCPA is to be construed "consistent with fee provisions of statutes *such as title VII of the Civil Rights Act of 1964*." S. REP. NO. 112 at 14 (emphasis added). Thus, the Senate intended that HCPA be construed "consistent" with how *Gaslight* construed section 706(k). Nor do we believe that Congress meant to tie final resolution of a parent's eligibility for fees to *subsequent* judicial decisions. At the time that Congress enacted HCPA, it had no reason to anticipate that the Court would construe "action or proceeding" any differently from how the phrase had been construed in *Gaslight*. *See supra* note 7.

> Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings.

The Court's decision in Gaslight *further established the right under title VII to sue solely to obtain an award of attorney's fees for legal work done in State and local proceedings.* As the Court stated:

> It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level.

Under the Court's reasoning, since the Education of the Handicapped Act, like title VII, requires parents to exhaust administrative remedies before seeking judicial relief, prevailing parties under the Education of the Handicapped Act must also be entitled to recover legal fees for the costs of mandatory proceedings.

131 CONG. REC. 21,392 (1985) (citations omitted) (emphasis added). Senator Simon was a member of the Committee on Labor and Human Resources and one of the twelve Senators who signed the "additional views" portion of the committee report.

D.C. draws heavily on the remarks of Senator Weicker. In introducing the HCPA bill in the full Senate before it was referred to committee,[15] Senator Weicker characterized it as follows:

> [T]he legislation I am introducing today is a specific response to the court's opinion in Smith versus Robinson. My amendment to Public Law 94-142 is for the limited purpose of clarifying what I believe has

[15]This version, like the final version of the bill, contained the action or proceeding language. *See* S. 415, § 2, 99th Cong., 1st Sess., 131 CONG. REC. 1980 (1985).

> always been, and continues to be, the intent of Congress: that reasonable attorneys' fees be available to parents of handicapped children *who prevail in a civil court action* to enforce their child's right to education.

131 CONG. REC. at 1980 (emphasis added). Likewise, in proposing the substitute to the bill reported out of committee, Senator Weicker stated:

> The bill reverses the Supreme Court's Smith versus Robinson decision of July 5, 1984. In that decision, the Court ruled, contrary to the original intent of Congress, that Public Law 94-142 does not allow the award of attorney's fees to parents who, after exhausting administrative procedures, *prevail in a civil court action* to protect their child's right to a free appropriate public education. . . .
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> . . . .
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> . . . I urge my colleagues to support this important piece of legislation which will restore to parents of handicapped children the right to be awarded attorney fees and other reasonable expenses *when they must go to court* to secure the educational rights promised to them by Congress.

Id. at 21,389, 21,390 (emphasis added).

Little if anything can be inferred from these and like statements by other Senators.[16] In stating that a parent who ultimately prevails in court would be entitled to recover his fees, Senator Weicker did not expressly commit himself one way or the other on whether a parent who prevails at the administrative level would likewise be entitled to recover his fees. Nor was the setting of the debate such that this omission can reasonably be viewed as signalling *disagreement* with such a proposition; Senator Weicker did not purport to be furnishing an *exhaustive* explanation of the bill's applications, but only an explana-

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[16] *See, e.g., id.* at 21,390 (statement of Sen. Stafford) ("This bill amends [EHA] to make reasonable attorney's fees available to parents *who prevail in court actions* filed under [EHA].").

tion of the bill's application to the facts of *Smith v. Robinson*. Indeed, far from at any point disparaging the suggestion that HCPA would authorize fees for a parent who prevails at the administrative level, Senator Weicker signed the "additional views" portion of the committee report, which, as we have indicated, expressly incorporated the Court's analysis in *Gaslight*.[17]

At most, D.C. has shown that not *all* Senators at *all* times held or expressed a view on whether a parent who prevailed at the administrative level could recover his fees. But in the absence of even one Senator who expressly took issue with the construction of "action or proceeding" offered by the committee report and reiterated by Senator Simon on the floor, we accept that view as the one adopted by the full Senate.

3. *Conference Committee*

The disposition of the respective House and Senate bills in conference furnishes the strongest evidence that *both* chambers intended HCPA to authorize fees for parents who prevail in EHA administrative proceedings. *See Demby v. Schweicker*, 671 F.2d 507, 510 (D.C. Cir. 1981) (Opinion of MacKinnon, J.) (noting that conference committee report "is the most persuasive evidence of congressional intent" after statutory text itself). As a concession to those Representatives who opposed awarding fees to parents who prevail at the administrative level, the House bill contained a "sunset" provision phasing out this authority after four years. *See* H.R. 1523, 99th Cong., 1st Sess. § 6(a)-(b), 131 CONG. REC. 31,370 (1985).[18] This provision was eliminated in the conference bill. The conference report explained:

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[17]Indeed, Senator Weicker, one of the floor managers of the bill, never took issue with Senator Simon's statements that HCPA would apply to parents who prevail in administrative proceedings.

[18]This objective was to be accomplished by substituting the phrase "civil action" for the phrase "action or proceeding." *See id.* § 6(a).

> The House amendment, but not the Senate bill, sunsets the court's authority to award fees at the administrative level after a period of time specified in the legislation.
>
> The House recedes.

H.R. CONF. REP. No. 687, 99th Cong., 2d Sess. 7 (1986). The clear implication is that the resulting bill retains without restriction "the court's authority to award fees at the administrative level."

D.C. unconvincingly suggests that the conferees may have abandoned the sunset provision in order *to clarify* that HCPA does not authorize fees for parents who prevail at the administrative level. If the conferees had intended to delete the sunset provision as superfluous, we do not think they would have described the House as "reced[ing]" to the Senate position on "the court's authority to award fees." *Cf. North Haven Bd. v. Bell*, 456 U.S. 512, 528-29 (1982) (use of word "recede" conveys that "the Senate version . . . prevailed for substantive reasons," not stylistic reasons).

Moreover, D.C.'s theory is inconsistent with the post-conference characterization of HCPA in the House. In explaining the final bill to their colleagues, the House conferees, who included Representatives who originally opposed recovery of fees at the administrative level altogether, expressed disappointment with the deletion of the sunset provision:

> [W]e have authorized the awarding of fees at the due process hearing system level in disputes which do not go on to court on a substantive issue. I fear that this . . . provision may prove to be a serious mistake . . . .
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> . . . .
>
> [But] [i]n good conscience, I believe that the good outweighs the bad and for that reason, I shall vote for this conference agreement.

132 CONG. REC. 17,609 (1986) (statement of Rep. Bartlett).

> I do not support the one provision which provides open ended authority to pay attorney's fees at the administrative level. Despite this reservation, I will vote for the conference report and I urge my colleagues to do the same.

Id. at 17,611 (statement of Rep. Jeffords). Unless we are to assume that these Representatives totally misunderstood what transpired in conference — an assumption that we have *no* ground to credit — it is clear from their statements that the conferees understood deletion of the House sunset provision as removing any limit on the court's authority to award fees to parents who prevail at the administrative level.

4. *Contemporaneous Executive Construction*

The authority of courts under HCPA to award fees to parents who prevail in administrative proceedings is also supported by executive branch interpretations expressed contemporaneously with the legislation's enactment. In response to House inquiries, the Secretary of Education ("Secretary") indicated that he was dissatisfied with the version of HCPA enacted by the Senate because

> [t]he court could also award fees for administrative proceedings *where no court case resulted so long as the parents prevailed in those proceedings.*

Letter from W. Bennett, Secretary of Education, to Rep. S. Bartlett (Sept. 10, 1985) (emphasis added), *reprinted in* Addendum to Brief for Appellees at A-11. When the bill was presented to the President, the Secretary reiterated this concern, but nonetheless urged that the bill be signed into law. *See* Letter from W. Bennett, Secretary of Education, to J. Miller, Director, Office of Management and Budget (July 25, 1986), *reprinted in* Addendum to Brief for Appellees at A-16, A-17.

D.C. argues that we should disregard these statements because the Department of Education has no delegated enforcement responsibilities under HCPA. However, our duty to defer to an agency's reasonable construction of its

own organic statute, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), does not exhaust our interest in what the executive has to say about ambiguous statutes. Communicated to Congress in the midst of its deliberations, the Secretary's views in this case formed part of the legislative background. *See, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982) (Court "attach[es] 'great weight' to agency representations to Congress when the administrators 'participated in drafting and directly made known their views to Congress in committee hearings' " (quoting *Zuber v. Allen*, 396 U.S. 168, 192 (1969)). Had the Secretary misapprehended the effect of HCPA on this point, Congress would have had a strong institutional incentive to correct him in order to forestall any veto threat. Consequently, we construe Congress' failure to challenge the Secretary's interpretation as further confirmation that Congress *did* intend HCPA to authorize recovery of fees by a parent who prevails at the administrative level.

III. Conclusion

Like the four other circuit courts that have addressed this question, we conclude that both the text and the legislative history of HCPA evidence congressional intent to authorize recovery of fees by a parent who prevails in EHA administrative proceedings. Therefore, we vacate the decision of the panel and affirm the District Court's determination that Moore was entitled to recover the fees incurred in her successful administrative proceedings against D.C. We also remit the case to the panel for further consideration of D.C.'s challenge to the size of the fee award.

It is so ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 21, 1988 Decided June 20, 1989

No. 88-7003

LANI MOORE, et al.

v.

DISTRICT OF COLUMBIA, et al., APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 87-00941)

Donna Murasky, with whom *Frederick D. Cooke, Jr.*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, District of Columbia, were on the brief, for appellants.

Michael J. Eig, with whom *Matthew B. Bogin* and *Margaret A. Kohn* were on the brief, for appellees.

Before: EDWARDS, WILLIAMS and FRIEDMAN,* *Circuit Judges.*

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* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

Opinion for the Court filed by *Circuit Judge* FRIEDMAN.

Dissenting opinion filed by *Circuit Judge* EDWARDS.

FRIEDMAN, *Circuit Judge*: The question in this case, here on appeal from the United States District Court for the District of Columbia, is whether under the Education Of All Handicapped Children's Act ("EHA"), 20 U.S.C. § 1400 *et seq., as amended by* The Handicapped Children's Protection Act of 1986 ("HCPA"), 20 U.S.C. § 1415(e)(4)(B) *et seq.*, the district court has authority to award attorney fees to persons who prevail in administrative proceedings under that statute, in a suit brought solely to obtain those fees. The district court held that the Act authorizes it to award attorney fees in that situation and made an award. *Moore v. District of Columbia*, 666 F. Supp. 263 (D.D.C. 1987). We hold that the Act does not give the district court authority to award such fees, and therefore reverse the district court's award.

I

A. The EHA is a comprehensive scheme providing federal funds to aid States and local agencies in complying with their constitutional obligations to provide public education for handicapped children. *Smith v. Robinson*, 468 U.S. 992, 1009 (1984); *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982). As a condition of obtaining federal financial assistance, the States must have adopted "a policy that assures all handicapped children the right to a free appropriate public education," 20 U.S.C. § 1412(1), and provide procedural safeguards for the enforcement of those rights. 20 U.S.C. § 1415.

The "free appropriate public education" required is tailored to the unique needs of the handicapped child by means of an "individualized educational program." Pre-

pared at meetings between a representative of the local school district, the child's teacher, and the parents or guardians of the child, the program must include statements about the child's present level of performance, annual goals, the specific educational services to be provided, and appropriate objective criteria and evaluation procedures to determine whether educational objectives are being achieved. 20 U.S.C. § 1401(19).

The EHA sets forth a number of procedural safeguards that give parents the opportunity directly to participate in decisions concerning the education of their handicapped children. Parents have the right (1) to examine all relevant records concerning the evaluation and educational placement of their child, § 1415(b)(1)(A), (2) to receive prior written notice whenever the school district proposes or refuses to change the placement of their child, § 1415(b)(1)(C), and (3) to receive an "impartial due process hearing" after registering a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child." § 1415(b)(1)(E). The filing of such a complaint with the school district creates the opportunity for a hearing before either the State educational agency, the local educational agency, or the intermediate educational agency, as State law provides. 20 U.S.C. § 1415(b)(2).

When the hearing is conducted by a local or an intermediate educational agency, any party aggrieved by the agency's findings and decision may obtain review by the State educational agency. 20 U.S.C. § 1415(c). Parties to that hearing or to the State review proceeding have "the right to be accompanied and advised by counsel" and by persons with special knowledge or training regarding the problems of handicapped children. 20 U.S.C. § 1415(d).

Administrative decisions are final, 20 U.S.C. § 1415(e)(1), except that any party aggrieved by the findings and

decision made at the hearing (that are not appealable to the State agency under subsection (c)) or any party aggrieved by the findings and decision of the State review proceeding may bring a civil action "with respect to the complaint presented pursuant to [section 1415]" in a State court or in a United States District Court. 20 U.S.C. § 1415(e)(2). In that judicial action, the court may take additional evidence at the request of a party, and "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2).

As originally enacted, the EHA did not contain any provision for the payment of attorney fees to parents who were the prevailing parties. Parents asserting claims under the EHA frequently joined claims based on § 504 of the Rehabilitation Act of 1973 or 42 U.S.C. § 1983 in order to take advantage of the fee-awarding provisions of those statutes. In *Smith v. Robinson*, 468 U.S. 992 (1984), the Supreme Court held (1) that where the EHA covered a suit brought on behalf of a handicapped child, that Act provided the exclusive remedy for the enforcement of the child's rights, and (2) that because the EHA did not contain a provision for attorney fees, fees were not available in suits brought to enforce those rights.

Congress responded by enacting the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796-98 (HCPA), which effectively overturned the Supreme Court's decision in *Smith v. Robinson*. The HCPA amends the EHA "to authorize the award of reasonable attorneys' fees to certain prevailing parties, to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination, and for other purposes." Preamble to Pub. L. No. 99-372.

B. The appellees are nine learning disabled children who prevailed in due process hearings under the EHA

in the District of Columbia and were placed in various private day schools throughout the District. After the District rejected their requests for reimbursement of the attorney fees and costs they had incurred in the administrative proceedings, the appellees brought the present action in the district court for the sole purpose of obtaining such fees and costs.

On cross-motion for summary judgment, the district court held that § 1415(e)(4)(B) of the EHA (the provision added by the HCPA, that provides for the award of attorney fees) authorizes a court in a suit brought solely for that purpose, to award attorney fees for services rendered during the administrative proceedings. After an evidentiary hearing, the court awarded the nine appellees a total of $48,337.42 as attorney fees and costs covering both the administrative proceedings and the district court litigation.

II

As in every case of statutory interpretation, our analysis "must begin with the language of the statute itself." *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980). The provision of this statute providing for the award of attorney fees is § 1415(e)(4)(B), which states:

> In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

A. In determining whether this provision authorizes a court to award attorney fees for services rendered in the administrative proceeding, in a suit brought solely to obtain such fees, three things stand out:

1. The reference to "brought under this subsection" is to subsection (e), which is one of six subsections of

section 1415. When Congress wished to refer more broadly to other provisions of the statute, it said so explicitly. *See, e.g.*, § 1412 ("to qualify for assistance under this subchapter"), § 1413(a) ("the eligibility requirements set forth in section 1412 of this title"), § 1413 (a)(9) ("Federal funds made available under this subchapter"), § 1415(e)(2) ("complaint presented pursuant to this section"), and § 1415(e)(3) ("[d]uring the pendency of any proceedings conducted pursuant to this section").

The only reference in subsection 1415(e) to the bringing of actions or proceedings is the statement in § 1415 (e)(2) that "[a]ny party aggrieved by the findings and decision made under subsection (b) of this section . . . and any party aggrieved by the findings and decision under subsection (c) of this section [subsection dealing with administrative proceedings by State educational agencies],

> shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Section 1415(e)(2) permits a "party aggrieved" by the administrative decision to bring a civil action "with respect to the complaint presented pursuant to this section [section 1415]," i.e., such party may bring suit in a State or federal court to challenge the adverse administrative decision of the State agency. None of the appellees was a "party aggrieved" by the administrative decision in these cases, since all the appellees prevailed

in those proceedings. *Cf. Robinson v. Pinderhughes*, 810 F.2d 1270, 1275 (4th Cir. 1987). Since there is nothing in the provisions governing the State administrative procedures (subsections 1415(b) and (c)) that provides for the award of attorney fees in the administrative proceeding or even suggests the possibility of such an award, the appellees cannot claim that they are "parties aggrieved" by the administrative decision because that decision did not award them attorney fees.

Honig v. Doe, 108 S. Ct. 592 (1988), involved the "stay-put" provision of the EHA, which provides that during the pendency of any proceeding conducted pursuant to section 1415, the child shall remain in its current educational placement. 20 U.S.C. § 1415(e)(3). In suits brought by parents challenging changes in the educational placement of handicapped children that were made during State administrative proceedings, the Supreme Court held that during such proceedings a State could not remove a child from its existing school placement on the ground that the child had engaged in dangerous or disruptive conduct in the school. In rejecting the State's claim that there should be a "dangerousness" exception to the "stay-put" provision, the Court stated that school officials had adequate authority to deal with a "truly dangerous child" by "invok[ing] the aid of the courts under § 1415(e)(2), which empowers courts to grant any appropriate relief," 108 S. Ct. at 605, and that "school officials are entitled to seek injunctive relief under § 1415(e)(2) in appropriate cases." *Id.* at 606.

We do not read the statements in *Honig*, which involved a quite different issue, as indicating that a suit seeking attorney fees for services rendered in the administrative proceeding would be an action or proceeding "brought under" subsection 1415(e). The Supreme Court there addressed the authority of a district court to grant an injunction pursuant to its power under § 1415(e)(2) to "grant such relief as the court determines is appro-

priate." In concluding that the authorized "relief" a court may grant includes an injunction, the Supreme Court intimated no opinion on whether a suit for attorney fees is "brought under" subsection 1415(e).

2. Attorney fees may be awarded only to a "prevailing party." This language refers to a prevailing party in the "action or proceeding brought under this subsection," i.e., attorney fees may be awarded only to someone who has prevailed in an "action or proceeding" brought under subsection 1415(e). The fact that the appellees were the prevailing parties in the administrative proceedings did not make them "prevailing part[ies]" to whom § 1415 (e) (4) (B) authorizes the award of attorney fees.

3. The attorney fees are to be awarded as "part of the costs." If an attorney fee were awarded in a suit brought solely to obtain the fee, the fee could not be awarded as "part of the costs" in the suit since the fee was the sole objective of the suit.

The foregoing considerations indicate that the language Congress used in § 1415(e) (4) (B) provided for the award of attorney fees only in cases in which a party who lost in the administrative proceedings brought a judicial action challenging the administrative decision and prevailed in that judicial action. That provision does not provide for the award of attorney fees to someone who prevailed in the administrative proceedings and then brought a judicial action solely to obtain attorney fees for services rendered in those proceedings.

B. The appellees contend, however, that the use of the word "proceeding" in § 1415(e) (4) (B), in addition to the word "action," indicates that Congress intended to permit a judicial award of attorney fees for services rendered in the administrative proceedings in a suit brought solely for that purpose. Whatever Congress may have intended by referring to both "action" and "proceeding," however, the action or proceeding must have been "brought under" subsection 1415(e) for the court

to be authorized to award attorney fees. As we have shown, a suit for attorney fees for services rendered in the administrative proceeding would not be "brought under" that subsection.

Thus, even if the reference to "proceeding" were deemed to mean the administrative proceeding, the statute still would not authorize the award of attorney fees without a subsequent civil action. Indeed, if Congress had intended to provide attorney fees for the administrative proceedings alone, it is surprising that Congress did not provide for the administrative tribunal, which would be most familiar with the services the attorney had rendered before it, in the first instance to pass upon the request for attorney fees, instead of requiring the prevailing party in the administrative proceeding to resort to federal litigation to obtain attorney fees incurred in those proceedings.

The reason Congress used the phrase "action or proceeding" is unclear. Perhaps the legislature merely used the same words it had used in many other statutes providing for the award of attorney fees. The word "proceeding" may have been intended to authorize a court in a proceeding challenging an adverse administrative decision to award the prevailing party attorney fees incurred in both the judicial and the administrative proceedings. But whatever the reason, a separate suit to recover attorney fees for the administrative proceeding would not be "brought under" subsection 1415(e).

The only reference in subsection 1415(e) to administrative proceedings is in § 1415(e)(4)(D), which bars an award of attorney fees

> in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—
>
> (i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil

> Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;
>
> (ii) the offer is not accepted within ten days; and
>
> (iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

This provision, however, does not authorize the award of attorney fees for administrative proceedings. It merely provides that a parent who rejected an offer of settlement, made in either the administrative or the judicial proceedings, cannot obtain attorney fees if the result the prevailing parent obtains in court is not more favorable than the offer of settlement. Thus, it covers the situation where a parent rejects an offer of settlement made before the administrative proceeding begins, loses at that proceeding or obtains less favorable relief than the parent sought, and then prevails in the subsequent judicial proceeding but obtains less favorable relief than was offered prior to the administrative proceeding.

The fact that the administrative officer is authorized to make findings on whether the relief awarded at the administrative proceeding is not more favorable than that provided in the administrative settlement does not suggest that Congress intended to authorize the judicial award of fees for administrative proceedings. Since no one claims that the administrative officer is authorized to award fees, such findings would be relevant only in a subsequent civil action brought under subsection 1415(e) by the aggrieved party.

C. In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), the Supreme Court held that a district court could award a prevailing party in a Title VII employment discrimination suit attorney fees for services ren-

dered in prosecuting her claim in State administrative and judicial proceedings that Title VII required the claimant to exhaust before instituting a federal suit. The Court held that such an award of attorney fees was authorized under § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), which provided in pertinent part that

> [i]n any action or proceeding under this subchapter [Title VII] the Court, . . . may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs.

Ms. Carey filed a district court suit alleging violations of the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, and the thirteenth amendment, after she had prevailed in a State administrative proceeding that was on appeal to the State court. Upon prevailing in the State court, she filed in the federal court an application for attorney fees, most of which were for services rendered in the State administrative and judicial proceedings. Apparently treating the case as one in which the federal court suit was filed solely to obtain attorney fees for services rendered in the State proceedings, the Supreme Court held that "§§ 706(f) [the provision authorizing district court suits to enforce Title VII] and 760(k) of Title VII authorize a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII." 447 U.S. at 71.

The Court stated that "[s]ince it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that § 706(f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings." 447 U.S. at 66. The Court reasoned that the availability of a fee award for work done in State pro-

ceedings should not depend upon whether the plaintiff ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees because "[i]t would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level." *Id.*

Justice Stevens filed a concurring opinion which

> emphasize[d] that this federal litigation was commenced in order to obtain relief for respondent on the merits of her basic dispute with petitioners, and not simply to recover attorney's fees. Whether Congress intended to authorize a separate federal action solely to recover costs, including attorney's fees, incurred in obtaining administrative relief in either a deferral or a nondeferral State is not only doubtful but is a question that is plainly not presented by this record.

447 U.S. at 71. Justice Stevens further stated:

> A quite different question would be presented if, before any federal litigation were commenced, an aggrieved party had obtained complete relief in the administrative proceedings. It is by no means clear that the statute, which merely authorizes a "court" to award fees, would authorize a fee allowance when there is no need for litigation in the federal court to resolve the merits of the underlying dispute.

447 U.S. at 72.

The Supreme Court revisited this issue in *North Carolina Dept. of Transp. v. Crest Street Community Council, Inc.*, 479 U.S. 6 (1986). There the plaintiffs had initiated a State administrative proceeding to prevent the construction of a highway project that allegedly would violate civil rights protected by Title VI of the Civil Rights Act of 1964. The plaintiffs also moved to inter-

vene in an existing federal action concerning the highway project and to file a civil rights complaint. Before the court ruled on those motions, the State administrative proceedings were settled and the court dismissed the plaintiffs' proposed civil rights complaint.

The plaintiffs then filed suit in the district court seeking solely an award of fees under 42 U.S.C. § 1988, which authorizes a court to award an attorney fee as part of the costs "[i]n any action or proceeding to enforce . . . title VI of the Civil Rights Act of 1964. . . ."

The Supreme Court held that a district court may not award attorney fees under 42 U.S.C. § 1988 in a separate action brought solely to recover fees incurred in the administrative proceedings. The Court reasoned that

> [t]he plain language of section 1988 suggests the answer to the question whether attorney's fees may be awarded in an independent action which is not to enforce any of the civil rights laws listed in § 1988. The section states that *in the action or proceeding to enforce* the civil rights laws listed . . . *the court* may award attorney's fees. The case before us is not, and was never, an action to enforce any of these laws. On its face, § 1988 does not authorize a court to award attorney's fees except in an action to enforce the listed civil rights laws.

479 U.S. at 12 (emphasis in original).

The Court characterized *Carey* as a "case[] in which civil rights litigation was preceded by administrative proceedings, [where] this Court has had occasion to consider whether the court in the civil rights action could award attorney's fees for time spent in the particular administrative processes." 479 U.S. at 11. The Court stated that "dicta in opinions of this Court suggest that the authorization of attorney's fee awards only by a court in an action to enforce the listed civil rights laws would be anomalous [citing *Carey*, 447 U.S. at 65-66]," but concluded that "if one must ignore the plain language

of a statute to avoid a possibly anomalous result, '[t]he short answer is that Congress did not write the statute that way.'" 479 U.S. at 13-14. The Court noted that "we now believe that the paradoxical nature of this result [alluded to in *Carey*] may have been exaggerated. . . . It is entirely reasonable to limit the award of attorney's fees under § 1988 to those parties who, in order to obtain relief, found it necessary to file a complaint in court." 479 U.S. at 14.

Just as a suit for attorney fees is not an "action or proceeding to enforce . . . title VI of the Civil Rights Act," so the suit for attorney fees in the present case is not one "brought under" subsection 1415(e). In this respect, the present case parallels *Crest Street.*

Crest Street also indicates that it would be "entirely reasonable to limit the award of attorney's fees . . . to those parties who, in order to obtain relief, find it necessary to file a complaint in court." Although that statement was made with respect to the award of attorney fees under section 1988, there is no valid reason why the principle should be any less applicable to the award of such fees under § 1415(e)(4)(B). To the extent that *Carey* suggests a contrary conclusion, that view no longer seems tenable in view of *Crest Street.*

A number of cases that have held that the district court has authority under 20 U.S.C. § 1415(e)(4)(B) to award fees solely for the administrative proceedings (see part V below) have distinguished *Crest Street* on the ground that, unlike the EHA, Title VI does not require that claimants initially exhaust State or local administrative remedies prior to suing. *See, e.g., Eggers v. Bullitt County School Dist.*, 854 F.2d 892, 895 (6th Cir. 1988); *Duane M. v. Orleans Parish School Bd.*, 861 F.2d 115 (5th Cir. 1988). *Crest Street*, however, did not turn on whether the administrative proceeding is "mandatory or optional, . . . integral or peripheral to the enforcement scheme," 479 U.S. at 22 (Brennan, J., dissenting); rather

the Court's decision was based on the language of the fee provision there at issue.

Finally, the statute involved in *Carey*, which provided for the award of attorney fees "[i]n any action or proceeding under" Title VII, was far broader than the narrowly constrained authority in § 1415(e)(4)(B) to award attorney fees only in an action or proceeding "brought under" subsection 1415(e).

III

The "plain language" of § 1415(e)(4)(B) "controls its construction, at least in the absence of 'clear evidence,' of a 'clearly expressed legislative intention to the contrary.'" *Bread Political Action Comm'n v. FEC*, 455 U.S. 577, 581 (1982) (citing *United States v. Apfelbaum*, 455 U.S. 115, 121 (1980), and *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Since the cases that have held that the district court has authority to award attorney fees solely for the administrative proceedings (described in part V below) have relied heavily on selected and sometimes isolated portions of the legislative history, we discuss that history in detail.

As noted, the EHA originally contained no provision for the award of attorney fees, and in *Smith v. Robinson*, 468 U.S. 992 (1984), the Supreme Court held that the Act did not authorize such an award. In *Smith* the parents and child brought suit and prevailed in the district court on their claims under the EHA; there they also had based the same claims upon other statutes and the Constitution. The Court's reasoning in denying attorney fees was that none of the other statutory and constitutional claims provided in that context for an award of attorney fees and that in the EHA there was "no indication that attorney's fees are available in an action to enforce those requirements [of the EHA]." 468 U.S. at 1006.

The provision of the HCPA that amended the EHA to authorize attorney fees was a congressional response to that ruling in *Smith v. Robinson.*

The congressional proceedings on the HCPA are complex. Parallel bills, S. 415 and H.R. 1523, containing different language, were introduced in both the Senate and the House in early 1985, after Congress had failed to act on two earlier bills, H.R. 6014 and S. 2859, introduced in 1984.

A. *The Senate Proceedings.* S. 415, introduced by Senator Weicker, contained an attorney fee provision nearly identical to the version finally enacted. It provided:

> In any action or proceeding brought under this subsection, the court, in its discretion, may award a reasonable attorney's fee as part of the costs to a parent or legal representative of a handicapped child or youth who is the prevailing party.

S. 415, 99th Cong., 1st Sess., 131 Cong. Rec. 1980 (1985).

In introducing the legislation, Senator Weicker stated on the floor that

> the legislation I am introducing today is a specific response to the court's opinion in Smith versus Robinson. My amendment to Public Law 94-142 is for the limited purpose of clarifying what I believe has always been, and continues to be, the intent of Congress: that reasonable attorneys' fees be available to parents of handicapped children *who prevail in a civil court action* to enforce their child's right to education. This amendment will in no way change requirements for parents to first exhaust the available administrative procedures in attempting to resolve the disagreements. The administrative hearing procedures will continue to be the process by which the vast majority of disagreements about appropriate educational programs are resolved. In other words, *civil court action* will remain, as it has always been, an option of last resort.

131 Cong. Rec. 1980 (1985) (emphasis added).

S. 415 was referred to the Committee on Labor and Human Resources, of which Senator Hatch was the chairman. The Subcommittee on the Handicapped, of which Senator Weicker was the chairman, held hearings on that bill. *Handicapped Children's Protection Act of 1985: Hearings on S. 415 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 99th Cong., 1st Sess. (1985). Senator Weicker indicated his commitment to overturning *Smith v. Robinson*. *Id.* at 2. Senator Simon stated:

> Some argue that the administrative hearings process should not be covered by this bill. Unfortunately the arguments on this ignore the fact that these hearings—where witnesses are called and sometimes technical and medical evidence is offered—are quasi-judicial, and certainly the schools have access to counsel for these hearings. It is simply an issue of fairness to ensure that parents may also have the advice of an attorney for these hearings.

Id. at 5.

An American Civil Liberties Union representative argued that, consistent with the Supreme Court's decision in *Carey*, the language in the bill authorized a fee award for administrative proceedings. A statement filed by the National School Boards Association, which opposed attorney fees for work done at the administrative level, expressed its concern that S. 415 amended the EHA to make "fees available to prevailing parents at both the court and administrative level." *Id.* at 64. The Council for Exceptional Children stated by letter that it "oppose[d] the broad authority" granted through the use of the term "any action or proceeding" and was concerned that *Carey* would permit parents who prevailed at the administrative proceeding to seek from the court reimbursement for fees incurred in that proceeding. *Id.* at 82-83.

The Committee on Labor and Human Resources, however, reported out its own bill rather than the bill the subcommittee had recommended. *See* S. Rep. No. 112, 99th Cong., 1st Sess. 4-11 (1985). The full committee bill had a complicated attorney fee provision that differed substantially from the one the bill originally contained. The committee bill provided that "*in any action brought under section [1415(e)]*, the court may, in its discretion, award a reasonable attorney's fee, reasonable witness fees, and other reasonable expenses of the civil action, in addition to the costs to a parent or legal representative of a handicapped child or youth who is the prevailing party." Sec. 615A(a)(1)(A) (emphasis added). The committee bill further provided that whenever the parent prevailed at the administrative level and the school system appealed the administrative decision in court pursuant to section 1415(e), the parent "shall be awarded a reasonable attorney's fee, reasonable witness fees, and other reasonable expenses of the civil action." Sec. 615A(a)(1)(B). The bill also provided that if the school system used an attorney at the administrative level, it would have to pay for an attorney to represent the parent of the handicapped child. Sec. 615A(b)(1)(C).

The committee report contained "additional views" of twelve Senators, which stated that Senators Hatch and Weicker intended to offer a substitute version of the bill when the Senate considered the legislation. Their substitute retained the "action or proceeding brought under this subsection" language of the original Weicker bill, but substituted the phrase "a reasonable attorney's fee in addition to the costs" for the original "a reasonable attorney's fee as part of the costs" language. The additional views statement explained:

> The Committee believes that the substitute bill provides fee awards to handicapped children on a

basis similar to other fee shifting statutes when securing the rights guaranteed to them by the EHA.

. . . .

Section 2 of the bill amends section 615(e)(4) of the EHA to permit a court, in its discretion, to award reasonable attorney's fees to parents or legal representatives of a handicapped child or youth who is the prevailing party in any action or proceeding brought under this subsection.

. . . .

The committee also intends that section 2 should be interpreted consistent with fee provisions of statutes such as title VII of the Civil Rights Act of 1964 which authorizes courts to award fees for time spent by counsel in mandatory administrative proceedings under those statutes. See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), (compare *Webb v. Board of Education for Dyer County*, 53 U.S.L.W. 4473 (U.S. April 17, 1985) in which the court declined to award fees for work done at the administrative level because the statute under which the suit was brought did not require the exhaustion of administrative remedies prior to going to court).

The committee intends that S. 415 will allow the Court, but not the hearing officer, to award fees for time spent by counsel in mandatory EHA administrative proceedings. This is consistent with the committee's position that handicapped children should be provided fee awards on a basis similar to other fee shifting statutes when securing the rights guaranteed to them by the EHA.

S. Rep. No. 112, 99th Cong., 1st Sess. 13-14 *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1803-04.

The Senate accepted and passed the Hatch and Weicker substitute bill. 131 Cong. Rec. 21389-93 (1985). In the floor debate, Senator Weicker stated:

The bill reverses the Supreme Court's Smith versus Robinson decision of July 5, 1984. In that decision,

the Court ruled, contrary to the original intent of Congress, that Public Law 94-142 does not allow the award of attorney's fees to parents who, after exhausting administrative procedures, *prevail in a civil court action* . . . .

. . . .

The purpose of S. 415 is simple—to overturn the Smith [v]ersus Robinson decision and thereby to clarify congressional intent regarding these matters.

. . . .

Allowing courts to award attorney's fees to prevailing plaintiffs is not an unusual congressional remedy. In fact, . . . Congress has already enacted more [than] 130 fee shifting statutes which provide for the award of attorneys fees to parties *who prevail in court* to obtain what is guaranteed to them by law.

. . . .

Mr. President, I urge my colleagues to support this important piece of legislation which will restore to parents of handicapped children the right to be awarded attorney fees and other reasonable expenses *when they must go to court* to secure the educational rights promised to them by Congress.

131 Cong. Rec. 21389-90 (emphasis added).

Senator Stafford stated:

This bill amends Public Law 94-142, the Education for Handicapped Children Act, to make reasonable attorney's fees available to parents *who prevail in court actions* filed under 94-142.

. . . .

Critics of S. 415 are fearful that the availability of attorney's fees award to prevailing parents will increase litigation. It is my belief that the opposite situation will occur. State and local education agencies will be more inclined to work out effective compromises with parents *before court action becomes necessary.*

> Parents must have every opportunity to participate with local school personnel to develop programs for their handicapped children if 94-142 is to provide the free and appropriate education that it promised. That includes making reasonable legal fees available if the services of an attorney are necessary.

Id. at 21390 (emphasis added).

Senator Kennedy stated:

> [T]his legislation will clarify congressional intent by authorizing the award of attorneys fees at the discertion of the judge to prevailing parents in Public Law 94-142 cases . . . .
>
> . . . .
>
> The basic purpose of this legislation and its primary intent states that handicapped children and their parents or legal guardians should be able to participate in the due process system and have access to the full range of remedies to protect their educational rights on an equal par with the school districts.

Id. at 21391.

Senator Kerry stated:

> The bill is designed to ensure that all parents or legal guardians of handicapped children are able to fully access the available remedies to protect their handicapped children's educational rights.
>
> . . . .
>
> S. 415 is designed to reinforce the rights to education for all handicapped children provided in Public Law 94-142 the Education of the Handicapped Act, including their rights to access the courts when education is being denied to them.

Id. at 21391-92.

Senator Simon, who spoke just before the Senate voted, stated:

> I would like to discuss two major aspects of this bill: the inclusion of the right to reimbursement for fees

incurred during the administrative process; and the requirement that administrative proceedings be exhausted prior to court action.

The language of S. 415, which permits the award of a reasonable attorney fee in any action or proceeding brought under this subpart, is identical to the language of title VII of the Civil Rights Act of 1964, interpreted by the Supreme Court in *New York Gaslight Club v. Carey* (447 U.S. 54) (1980). The Court stated:

> Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings.

The Court's decision in *Gaslight* further established the right under title VII to sue solely to obtain an award of attorney's fees for legal work done in State and local proceedings. As the Court stated:

> It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level.

Under the Court's reasoning, since the Education of the Handicapped Act, like title VII, requires parents to exhaust administrative remedies before seeking judicial relief, prevailing parties under the Education of the Handicapped Act must also be entitled to recover legal fees for the costs of mandatory proceedings.

131 Cong. Rec. 21392 (1985).

B. *The House Proceedings.* Representative Williams, Chairman of the House Subcommittee on Select Education, introduced H.R. 1523, which provided:

> In any action brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees and other expenses as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

H.R. 1523, 99th Cong., 2d Sess., 131 Cong. Rec. 5046 (1985).

This bill was referred to the House Committee on Education and Labor and considered by Representative Williams' subcommittee. The subcommittee reported a substitute bill, which provided that the parent who was the prevailing party in the civil action also could obtain attorney fees incurred in the administrative proceedings in three specific circumstances.

In markup sessions of the House Committee on Education and Labor, held after the Senate had passed S. 415, Representative Williams offered an amendment (cosponsored by Representative Biaggi), which he described as identical to the Senate provision, which would "provide[] that parents who prevail in an action or proceeding in which they claim the denial of a free, appropriate public education under P.L. 94-142 may recover attorneys' fees at the court's discretion." *House Committee on Education and Labor Markup of H.R. 1523*, 124 (Sept. 11, 1985) (transcripts available at the Office of the Clerk, U.S. House of Representatives) [hereinafter *Markup*].

Representative Bartlett opposed the amendment because it "allow[ed] for attorneys' fees at the administrative level in virtually all circumstances, without the case ever going to court." *Markup* at 132. Representative Bartlett offered an amendment, which the committee rejected, under which attorney fees incurred in "any administrative proceeding may not be awarded under this subparagraph unless the parents or guardian prevail on a substantive claim in the civil action." He explained that the amendment "would simply allow for attorney's

fees at the administrative level only when the parents prevail in court." *House Committee on Education and Labor Markup of H.R. 1523*, 27 (Sept. 19, 1985) (transcripts available at the Office of the Clerk, U.S. House of Representatives).

Representative Jeffords also opposed the Williams-Biaggi amendment. He favored the bill reported by the subcommittee, stating, "I think the subcommittee did an excellent job doing that [outlining the circumstances for which fees incurred at the administrative level would be awarded]. I understand that subsequent to that, for whatever reasons, there was a bill passed in the Senate which was much more generous, in a sense, to the handicapped individuals, and therefore the subcommittee decided to make the House bill equally more generous in that sense on attorneys' fees." *Markup* at 171-72.

Representative Jeffords offered an amendment similar to the subcommittee provision. Representative Biaggi opposed the amendment, stating that "[w]hat the gentleman [Representative Jeffords] is trying to do is go back to where we were in the subcommittee. Since that time the Senate has moved and reported a bill out. The administration supports what came out of the Senate, and we are just going along with what the Senate has." *Markup* at 174.

The House Committee reported an amended version of H.R. 1523, that incorporated the Williams-Biaggi amendment by adding the word "proceeding" to the fee provision of H.R. 1523. The committee report stated that "proceeding" referred to a due process hearing or a State level review. The report stated:

> Section 2 of the bill amends section 615(e)(4) of EHA to permit a court, in its discretion, to award reasonable attorneys' fees, . . . to the parents . . . who is the prevailing party in an action or proceeding (a due process hearing or a state level review) brought under Part B of EHA.

> The "action or proceeding" language in section 2 of the bill is identical to the language in title VII of the Civil Rights Act of 1964, interpreted by the Supreme Court in *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980). In *Gaslight*, the Court held that the use of the phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorneys' fees, expenses and costs incurred in court. The Court's decision also established a similar right under title VII to obtain an award of fees, costs, and expenses incurred in mandatory state and local administrative proceedings, even where no lawsuit is filed.
>
> . . . .
>
> Further, if a parent prevails on the merits at an administrative proceeding (and the agency does not appeal the decision), the parent may be awarded reasonable attorneys' fees, costs, and expenses incurred in such administrative proceeding. Usually, the amount of such fees, costs, and expenses will be agreed to by the public agency. If no agreement is possible, the parent may file a law suit for the limited purpose of receiving an award of reasonable fees, costs, and expenses.

H.R. Rep. No. 296, 99th Cong., 1st Sess. 5 (1985).

The bill the House committee reported also included a "sunset provision" under which judicial authority to award attorney fees to parents who prevailed in administrative proceedings would end four years after enactment. It accomplished this by providing that there would be substituted for "action or proceeding" the words "civil action," and that this provision would be effective in four years. As Representative Williams, the floor manager, explained on the floor of the House:

> [T]he legislation contains a sunset provision under which a court's authority to award fees to parents who prevail in administrative proceedings terminates 4 years after the date of the enactment of this legislation . . . . Thus, after 4 years, unless Congress

> passes additional legislation, a court's authority to award fees will be limited to civil actions in State or Federal courts in which parents prevail.

131 Cong. Rec. 31370 (1985).

Representative Williams also explained that the bill

> amends part B of EHA to provide that a parent or guardian of a handicapped child who prevails against a school district or State educational agency in a civil action in Federal or State court, or an administrative proceeding such as a due process hearing or State appeal, may be awarded reasonable attorney's fees, costs and expenses by the court.

Id.

Representative Bartlett, who considered the provision of the bill providing for attorney fees at the administrative level to be "a serious flaw," recognized that the bill so provided:

> Under H.R. 1523, for the first time, parents who retain an attorney for work conducted at the administrative hearing level will be able to recover fees if they prevail at the hearing, even if the issue does not go to court.

Id. at 31371.

In response to a question by Representative Bartlett, Representative Williams explained the meaning of the terms "action" and "proceeding":

> The term "action" is intended to include a civil action filed in a State or Federal court. The term "proceeding" is limited to the due process hearing that parents are required to exhaust under 615(b)(2) and the State appeal under section 615(c).

Id. at 31373.

Representative Jeffords, the ranking member of the Education and Labor Committee, expressed his concern that "[b]y providing for attorneys' fees at the adminis-

trative level, . . . we will be reversing our original intent and interfering with a procedure that is working," but acknowledged that "[o]ur debate on the issue though, has been precluded somewhat by the action taken by the other body. Instead, concerns regarding the wisdom of providing for attorneys' fees at the administrative proceedings level have been partially addressed in H.R. 1523 by the inclusion of a sunset provision." 131 Cong. Rec. 31376.

Representative Miller supported the provision for fees in both administrative and judicial proceedings:

> In those instances where parents feel compelled to pursue a formal hearing or court action to attain free appropriate education for their child, providing reimbursement for needed legal assistance is critical to assure fair and equal access to this right.

Id.

Representative Johnson expressed concern about the provision for fees "to be awarded at the administrative level, without limitation, without going to court." 131 Cong. Rec. 31377. Representative Williams responded:

> Mr. Speaker, the gentlewoman raises a matter which has been of great contention. I will tell my colleagues that it has been considered, that the bill has been accepted overwhelmingly, and the administrative fee language in this bill is identical to that which has been accepted in the Senate.

Id.

C. *The Conference Bill and Its Enactment.* The bills went to conference, which reported a bill that contained the language in "any action or proceeding brought under this subsection." The conferees changed the wording of the Senate bill that provided fees "in addition to the costs" to a bill providing for fees "as part of the costs." The conferees explained: "The conferees intend that the term 'attorneys' fees as part of the costs' include reason-

able expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case." H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1808.

The conference bill did not include the sunset provision in the House version. The conference report stated with respect to this action only that:

> 7. The House amendment, but not the Senate bill, sunsets the court's authority to award fees at the administrative level after a period of time specified in the legislation.
>
> The House recedes.

H.R. Conf. Rep. No. 687, at 7.

The conference bill added a number of provisions, not in the Senate or House bills, that were designed to avoid excessive fees. 20 U.S.C. § 1415(e)(4)(D), (E), (F), and (G). Those provisions reduce the amount of attorney fees that would otherwise be available in "actions or proceedings under the subsection." H.R. Conf. Rep. No. 687, at 6.

In the Senate debate on the conference report, Senator Weicker, a conference manager, stated:

> The Handicapped Children's Protection Act states explicitly what is implicit in the Education of the Handicapped Act regarding the civil right of handicapped children to an education. By allowing the courts to award attorneys' fees to prevailing parents or guardians, handicapped children are protected against discrimination in the same manner as are other vulnerable groups. What we do here today is to make the Education of the Handicapped Act consistent with more than 130 other fee shifting statutes which provide for the award of attorneys' fees to

> parties who prevail in court to obtain what is guaranteed to them by law.

132 Cong. Rec. 16823 (1986).

Senator Hatch, the chairman of the Senate conferees, stated:

> The agreement we are now considering is a compromise which I feel accomplishes two major objectives. First, it provides for the award of reasonable attorney's fees to prevailing parents in an Education of the Handicapped Act action or proceeding.

Id. at 16825.

In the House debate on the Conference Report, Representative Williams, a conference manager, stated:

> The bill clarifies the intent of Congress that handicapped children and their parents have available to them the full range of remedies necessary . . . includ[ing] the right to reimbursement of reasonable attorneys' fees in actions and proceedings in which they are declared the prevailing party.

132 Cong. Rec. 17608 (1986). He stated that "the conference agreement contains most of the key provisions in the House bill," and described the conference agreement as follows:

> First, with slightly different wording, both the Senate bill and the House amendment provide for the awarding of attorneys' fees in addition to costs to parents who prevail in any action or proceeding. Under the conference agreement, the Senate recedes to the House and the House recedes to the Senate with an amendment clarifying that the court in its discretion may award reasonable attorneys' fees to the prevailing parents as part of the costs of the action or proceeding.

Id. Representative Williams then explained the rejection of the sunset provision:

> The conference agreement does not include the "sunset provision" which was included in the House bill. Under this provision, the authority of the court to award fees to parents prevailing at administrative hearings would be repealed in 4 years. This provision was of particular concern to the House Republican conferees. On three separate occasions, all conferees from the other body rejected requests to include the "sunset" provision in the conference agreement.

Id. Representatives Bartlett and Jeffords expressed disappointment that the sunset provision was not included. *Id.* at 17608-09, 17610-11. Representative Hawkins, the chairman of the House conferees committee, stated that

> the statute only allows the award of attorneys' fees to prevailing parents, whether plaintiff or defendant in an action or proceeding. (Compare 42 U.S.C. § 1988).
>
> Second, under this bill, there is language making the Supreme Court's ruling *M[a]rek v. Chesny*, 87 L.Ed. 2d 1 (1985) applicable to both court actions and administrative proceedings. . . .
>
> Third, the conference agreement provides fees when a parent prevails in an action or proceeding.

Id. at 17611.

We draw the following conclusions from the legislative history:

1. The House intended to authorize the district courts to award attorney fees for services rendered in the administrative proceedings, in a suit brought solely for that purpose, and believed that the language in the Senate bill—"in any action or proceeding brought under this subsection"—accomplished that result. This is shown by (a) the repeated statements by Representative Williams, the chairman of the subcommittee that considered

the bill, and by opponents of the provision that that was its effect; (b) the House committee's addition of the word "proceeding" to the House bill, which was done in the belief that the change would make the attorney fee provision applicable to administrative proceedings; (c) the statement in the House Report that the word "proceeding" refers to administrative proceedings and that, consistent with the Supreme Court's decision in *Carey*, parents who prevail on the merits at an administrative proceeding may bring a separate action in court for attorney fees; and (d) the "sunset provision"—which would have repealed the word "proceeding" after four years—which was included as a concession to House members who opposed the broad authority to award fees for work done at the administrative level.

2. Although some members of the Senate intended to authorize the district court to award such attorney fees and believed that the Senate bill had that effect, other Senators had a contrary view. No clear expression of the Senate's intention can be discerned.

The only Senator who expressly stated that the Senate provision covered fees in administrative proceedings was Senator Simon who, although a member of the Committee on Labor and Human Resources, was not in charge of the bill. Senator Weicker, who introduced the bill and was a leader in its development and enactment, stated on a number of occasions, including a statement during debate on the conference bill, that the bill provided for attorney fees to parents who prevailed in court proceedings. Senator Stafford made a similar explicit statement. Many of the other statements made during Senate consideration of the legislation merely repeated the statutory language without focusing on precisely what it authorized.

The portion of the additional views statement in the Senate Report citing the Supreme Court's decisions in *Carey* and *Webb* is ambiguous. *Webb* did not involve a

suit brought solely to obtain fees for work done in State administrative proceedings. The petitioner there was a school teacher who, although unsuccessful in challenging his dismissal in State tenure rights hearings, finally had prevailed on a section 1983 claim in district court. The district court awarded attorney fees for time spent in the judicial proceeding but denied fees for time spent in proceedings before the local school board. In citing *Carey* (involving mandatory State administrative proceedings under Title VII) and *Webb* (involving an "optional" State proceeding not brought to enforce the civil rights laws), the additional views statement may have been suggesting only that parents who prevail in an EHA judicial action also will be awarded fees for work done at the administrative level.

3. The brief statement in the conference report about the conferees' rejection of the sunset provision in the House bill, which the report described as terminating "the court's authority to award fees at the administrative level," does not establish that the conferees believed the bill they recommended granted that authority. One possible explanation of the conferees' action is that the Senate conferees intended to adopt the authority the House bill conferred, but did not want to limit it to four years. An equally plausible explanation, however, is that the Senate conferees did not believe the conference bill contained that authority, so that there was no reason to terminate it after that time.

We cannot say that, viewed in its entirety, the legislative history reflects "a clearly expressed legislative intention to the contrary" of "the language of the statute itself" (*Consumer Product Safety Comm'n*, 447 U.S. at 108) that would justify the departure from the statutory language. Such a departure would be required to hold that the Act authorizes the award of attorney fees for services rendered in the administrative proceeding.

D. *The Secretary of Education's Interpretation.* In the interest of completeness, we allude to one other item in the history of the legislation, the significance of which is doubtful.

During the House consideration of the bill, Representative Bartlett requested the Secretary of Education to clarify the Administration's position on S. 415 as the Senate had passed it. Representative Bartlett stated that the Administration's prior expression of general support for S. 415 "is being construed to mean support for the 'action or proceeding' provision," which Bartlett stated "would allow the court to award fees to prevailing parents for both court costs and administrative hearing costs, even before the parent prevails in court." Letter from Representative Steve Bartlett to Secretary William J. Bennett (Sept. 5, 1985) (reproduced in Addendum to Appellees' Brief at A-8-9). The Secretary responded by letter that the Department's understanding was that under S. 415 "[t]he court could also award fees for administrative proceedings where no court case resulted so long as the parents prevailed in those proceedings." Letter from Secretary William J. Bennett to Representative Steve Bartlett (Sept. 10, 1985) (reproduced in Addendum to Appellees' Brief at A-10-11).

After Congress passed the bill, the Secretary recommended in a letter to the Director of the Office of Management and Budget that the President sign the bill. The Secretary stated that his Department "support[s] the award of attorney's fees to prevailing parents in judicial proceedings brought under the EHA," but noted that "[o]ur major remaining objection to the bill is that it would authorize the award of attorney's fees for work done in administrative proceedings." Letter from Secretary William J. Bennett to Director James C. Miller III (July 25, 1986) (reproduced in Addendum to Appellees' Brief at A-16-18).

These statements by the Secretary do not involve the traditional situation where a court gives considerable weight to the interpretation of a statute by the agency charged with its enforcement. *See, e.g., Udall v. Tallman*, 380 U.S. 1, 16 (1965). Although the Secretary has an important role under the statute in administering the federal grants to the States and also performs certain oversight functions, *see, e.g.*, 20 U.S.C. §§ 1417-1418 (Supp. 1988), the conduct of the administrative proceedings is left to the State and local educational agencies. The Secretary has nothing to do with the award of attorney fees.

In these circumstances, the Secretary's view that the statute authorized the award of attorney fees for services in the administrative proceedings in which the parent or child prevails, is entitled to little, if any, weight in determining whether a suit seeking only such fees is an "action or proceeding brought under" subsection 1415(e).

IV

It has been suggested that policy considerations militate against our conclusion. The argument is that it would be anomalous and would make little sense if parties who prevailed at the administrative proceeding were denied attorney fees, whereas if they lost at those proceedings and then prevailed in court they would receive fees.

The argument is undermined by *Crest Street*, which concluded that it was "entirely reasonable to limit the award of attorney's fees under § 1988 [and by the same reasoning under § 1415(e)(4)(B)] to those parties who, in order to obtain relief, found it necessary to file a complaint in court." 479 U.S. at 14. Indeed, there are indications in the legislative history of this statute that the Senate may have believed that most of the disputes under the Act over the provision of a proper education for handicapped children would be resolved informally at the

administrative level and that resort to judicial proceedings would be relatively infrequent. *See, e.g.*, 131 Cong. Rec. 21390 (1985) (statement of Senator Stafford). This belief could have led Congress to limit the award of attorney fees to parties who prevail on the merits in court actions.

In any event, our task is to apply the statute as written and not to rewrite it to achieve an objective that we deem desirable and fair. The alleged anomaly of denying attorney fees for administrative proceedings would not justify a departure from what we view as the correct reading of the language Congress used in providing for the award of attorney fees under this statute.

V

We reach our conclusion with considerable reluctance and some diffidence because of the numerous judicial decisions that have gone the other way. The Fifth and Sixth Circuits have reached the contrary conclusion, as did the Second Circuit in dictum. *Duane v. Orleans Parish School Bd.*, 861 F.2d 115 (5th Cir. 1988); *Eggers v. Bullitt County School Dist.*, 854 F.2d 892 (6th Cir. 1988); *see Counsel v. Dow*, 849 F.2d 731, 740-41 n.9 (2d Cir. 1988) (dictum), *cert. denied*, 109 S. Ct. 391 (1988). So have the overwhelming majority of district courts that have considered the precise issue. *See Williams v. Boston School Comm.*, No. 88-571-C (D. Mass. Mar. 14, 1989); *Schroeder v. San Mateo County*, 1988-89 EHLR Dec. 441:244 (N.D. Cal.); *Burr v. Ambach*, 683 F. Supp. 46 (S.D.N.Y. 1988); *Chang v. Board of Educ.*, 685 F. Supp. 96 (D.N.J. 1988); *Dow v. Watertown School Comm.*, 701 F. Supp. 264 (D. Mass. 1988); *Neisz v. Portland Pub. School Dist.*, 684 F. Supp. 1530 (D. Or. 1988); *Robert D. v. Sobel*, 688 F. Supp. 861 (S.D.N.Y. 1988); *Turton v. Crisp County School Dist.*, 688 F. Supp. 1535 (M.D. Ga. 1988); *Burpee v. Manchester School Dist.*, 661 F. Supp. 731 (D.N.H. 1987); *Keay v. Bismarck R-V School Dist.*, 1986-87 E.H.L.R. Dec. 558:317 (E.D. Mo.

1987); *Kristi W. v. Graham Indep. School Dist.*, 663 F. Supp. 86 (N.D. Tex. 1987); *Mathern v. Campbell County Children's Center*, 674 F. Supp. 816 (D. Wyo. 1987); *Michael F. v. Cambridge School Dept.*, No. 86-2532-C (D. Mass. Mar. 5, 1987); *Prescott v. Palos Verdes Peninsula Unified School Dist.*, 659 F. Supp. 921 (C.D. Cal. 1987); *School Bd. of Prince William County v. Malone*, 662 F. Supp. 999 (E.D. Va. 1987); *Unified School Dist. No. 259 v. Newton*, 673 F. Supp. 418 (D. Kan. 1987). At least two districts, however, have reached the conclusion we reach. *Mc Cormack v. Burlingame Elementary School Dist.*, No. C 88-0141 JPV (N.D. Ca. June 27, 1988); *Rollison v. Biggs*, 660 F. Supp. 875 (D. Del. 1987).

None of the opinions authorizing the award of attorney fees for administrative proceedings provides the detailed analysis of the statutory language and the legislative history we have made. That analysis convinces us that Congress did not authorize the district court to award attorney fees for services in the administrative proceeding, in a suit brought solely to obtain such fees.

Conclusion

The judgment of the district court awarding attorney fees and costs to the appellees is

reversed.

EDWARDS, *Circuit Judge, dissenting*: The simple issue in this case is whether a court has authority to award attorneys' fees to a person who has prevailed in an administrative proceeding under the Education of the Handicapped Act ("EHA"), as amended in 1986 by the Handicapped Children's Protection Act ("HCPA"). This is not a novel question, nor is it an issue of first impression, for it has been the subject of litigation in numerous actions in federal court. *Every circuit court* that has considered this issue has concluded that EHA provides for an award of attorneys' fees to parents who prevail in administrative proceedings in a suit brought to obtain those fees; and an overwhelming number of district courts have held the same.[2] I can see no reason for this court to conclude otherwise.

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[1] *See Duane v. Orleans Parish School Bd.*, 861 F.2d 115 (5th Cir. 1988); *Eggers v. Bullitt County School Dist.*, 854 F.2d 892 (6th Cir. 1988); *Counsel v. Dow*, 849 F.2d 731, 740-41 n.9 (2d Cir.) (dictum), *cert denied*, 109 S. Ct. 391 (1988).

[2] *See, e.g., Michael F. v. Cambridge School Dept.*, No. 86-2532-C, slip op. (D. Mass. Mar. 5, 1987); *Williams v. Boston School Comm.*, No. 88-571-C, slip op. (D. Mass. Mar. 14, 1989); *Doe v. Watertown School Comm.*, 701 F. Supp. 264 (D. Mass. 1988); *Burr v. Ambach*, 683 F. Supp. 46 (S.D.N.Y. 1988); *Chang v. Board of Educ.*, 685 F. Supp. 96 (D.N.J. 1988); *Neisz v. Portland Pub. School Dist.*, 684 F. Supp. 1530 (D. Or. 1988); *Dodds v. Simpson*, 676 F. Supp. 1045 (D. Or. 1987); *Robert D. v. Sobel*, 688 F. Supp. 861 (S.D.N.Y. 1988); *Turton v. Crisp County School Dist.*, 688 F. Supp. 1535 (M.D. Ga. 1988); *Burpee v. Manchester School Dist.*, 661 F. Supp. 731 (D.N.H. 1987); *Kristi W. v. Graham Indep. School Dist.*, 663 F. Supp. 86 (N.D. Tex. 1987); *Mathern v. Campbell County Children's Center*, 674 F. Supp. 816 (D. Wyo. 1987); *Prescott v. Palos Verdes Peninsula Unified School Dist.*, 659 F. Supp. 921 (C.D. Cal. 1987); *School Bd. of Prince William County v. Malone*, 662 F. Supp. 999 (E.D. Va. 1987); *Unified School Dist. No. 259 v. Newton*, 673 F. Supp. 418 (D. Kan. 1987). *But see McCormack v. Burlingame Elementary School Dist.*, No. C-88-0141 JPY, slip op. (N.D. Cal. June 27, 1988); *Rollinson v. Biggs*, 660 F. Supp. 875 (D. Del. 1987).

The majority offers an exhaustive examination of the case law and legislation bearing on the matter before us. But, in my view, the majority opinion supports a result just the opposite from the one it reaches. Most of the evidence cited by the majority shows that, in enacting HCPA, Congress clearly intended to provide attorneys' fees for those individuals who prevail in administrative proceedings. Because I believe the result reached by the majority is inconsistent with the language of the statute, its legislative history and the view held by an overwhelming majority of the courts that have addressed this question, I dissent.

I.

To begin with, the plain language of the statute provides that a court may award attorneys' fees to a party who has prevailed in either a judicial *action* or an administrative *proceeding*. Section 1415(e)(4)(B) *expressly* states that

> In any action or *proceeding* brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as a part of the cost to the parents or guardian of a handicapped child or youth who is the prevailing party.

20 U.S.C. § 1415(e)(4)(B) (emphasis added). There is no way that this provision can be read other than to allow for an award of fees to parents who prevail in administrative proceedings in a suit brought to obtain those fees.

The majority opinion simply ignores the plain language. Instead, it asserts that a party who prevails in a proceeding cannot seek attorneys' fees under the "subsection" because the party is not "aggrieved." Majority Opinion ("Maj. Op.") at 6 (referring to subsection 1415(e)(2)).[3] This argument completely begs the ques-

[3] Section 1415(e)(2) states that "[a]ny party aggrieved by the findings and decision made under subsection (b) of this section . . . and any party aggrieved by the findings and

tion. What this court is deciding is precisely whether a party who has secured all but attorneys' fees in a proceeding is an "aggrieved" party entitled to bring suit for attorneys' fees.

The majority opinion similarly glosses over the import of section 1415(e)(4)(D), which also discusses attorneys' fees for prevailing parties "in an action or proceeding." This section sets the parameters for such awards: it bars the award of attorneys' fees when either "the court or *administrative officer*" finds that the relief finally obtained by a prevailing party is not more favorable than an earlier offer of settlement. *See* 20 U.S.C. § 1415(e)(4)(D) (emphasis added).[4] Under this provision, an *administrative officer* has the authority to make findings relevant to an award of attorneys' fees. Thus, a party may file suit in court as an "aggrieved party" when an administrative officer's determinations are unfavorable with respect to findings necessary to support a claim for fees. The majority inexplicably ignores the statutory role of the administrative officer and the appealability of his or her adverse findings.

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decision under subsection (c) of this section [dealing with administrative proceedings by State educational agencies], shall have the right to bring a civil action with respect to the complaint presented pursuant to this section . . . ."

[4] Section 1415(e)(4)(D) bars an award of attorneys' fees in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—

> (i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;
>
> (ii) the offer is not accepted within ten days; and
>
> (iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

Furthermore, and more importantly, there is absolutely *nothing* in the language of section 1415(e)(4)(D) to support the majority's view that the statute "merely provides that a parent who rejected an offer of settlement, made in either the administrative or the judicial proceedings, cannot obtain attorney fees if the result the prevailing party *obtains in court* is not more favorable than the offer of settlement." Maj. Op. at 10 (emphasis added). As the highlighted portion of the quoted material shows, the majority opinion does nothing more than construe the statute in a way to achieve the result sought; but the language of section 1415(e)(4)(D) does not say what the majority says.

What the statute *does* say is that an award of fees is barred only if "the court *or the administrative officer* finds that the *relief finally obtained* by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement." "Relief finally obtained" can be the relief awarded in the administrative proceeding. Thus, if a parent rejects an offer of settlement because it does not include fees, and then obtains all of the relief sought except fees at the administrative proceeding, that parent is not barred from an award of fees under section 1415(e)(4)(D); and the administrative officer would be authorized to find that the relief awarded at the administrative proceeding "is not more favorable to the parents . . . than the offer of settlement." And, as the majority corrrectly recognizes, "such findings would be relevant *only* in a subsequent civil action brought under subsection 1415(e) by the aggrieved party" (*i.e.*, the parents who have failed to obtain fees). *See* Maj. Op. at 10 (emphasis added).

II.

Moreover, to the extent that there is any ambiguity in the meaning of the statute, it is cured by the legislative history, which makes clear that Congress provided

an action for attorneys' fees. The majority opinion itself concludes that "[t]he House intended to authorize the district courts to award attorneys' fees for services rendered in the administrative proceedings, in a suit brought solely for that purpose, and believed that the language in the Senate bill—'in any action or proceeding brought under this subsection'—accomplished this result." Maj. Op. at 30. The majority cannot point to anything in the Senate's legislative history that contradicts this understanding of the provision.

The majority only asserts that it can discern "no clear expression of the Senate's intention." *Id.* at 31. On the one hand, it acknowledges that Senator Simon saw the provision as establishing the right to sue for attorneys' fees; on the other hand, it finds somehow troubling the statements by Senator Weicker allowing "for the award of attorneys' fees to parties who prevail in court to obtain what is guaranteed to them by law." 132 CONG. REC. 16823 (1986) (statement of Sen. Weicker) (quoted in Maj. Op. at 28-29).

Senator Weicker's statements, however, in no way contradict Senator Simon's or the House's understanding of the attorneys' fees provision; and his statements in no way negate the view that the statute provides for attorneys' fees for parents who prevail in administrative proceedings. Indeed, this point is confirmed by the Amicus Brief submitted to this court. This brief, signed by various members of the Senate and House, who are identified as the "chief sponsors and co-sponsors of the legislation, chairmen and ranking minority members of the committees and subcommittees with jurisdiction, and conferees," says that

> *amici* believe that after two years of deliberation on exactly the issue before this Court, there can be no doubt that the effect, meaning, and intent of Congress' action was to provide for attorneys' fees for parents who prevail in administrative proceedings.

Brief Amicus Curiae on Behalf of Senators Tom Harkin, Edward M. Kennedy, John F. Kerry, Paul Simon, Robert T. Stafford, Lowell P. Weicker, Jr., and Representatives Tony Coelho, Augustus F. Hawkins, James M. Jeffords, Major R. Owens, Pat Williams at 1. In short, there is no basis for the majority's assertion that the House and the Senate were not in agreement on the attorneys' fees provision that both houses enacted into law.

Finally, the most convincing evidence of legislative intent is the HCPA conference bill and its enactment. The House version of the bill that went to conference included a provision saying that the authority of the court to award fees to parents prevailing at administrative hearings would be repealed in four years. 131 CONG. REC. 31370 (1985) (statement of Rep. Williams). This sunset provision was added to appease Representatives who opposed attorneys' fees at the administrative level. 131 CONG. REC. 31376 (1985) (statement of Rep. Jeffords). However, the conference bill deleted the sunset provision, thus removing any limitation on the authority of a court to award fees to parties prevailing in an administrative proceeding. H.R. CONF. REP. NO. 687, 99th Cong., 2d Sess. 5, at 7.

The majority opinion concedes that "one possible explanation" of the conferees' action in deleting the sunset provision is that the Senate conferees intended to adopt the authority the bill conferred, but did not want to limit it to four years. Maj. Op. at 32. I submit that this is the *only* possible explanation. The conference report itself expressly acknowledges "*the courts' authority to award fees at the administrative level,*" and then says that the conference bill removes the sunset provision that would have limited this authority. H.R. CONF. REP. NO. 687, 99th Cong., 2d Sess. 5, at 7 (emphasis added). The import of the conferees' action is thus absolutely clear.

The majority opinion argues that "an equally plausible explanation" of the conferees' action is that the Senate conferees did not believe the conference bill contained any authority for the award of fees at the administrative level, so that there was no reason to terminate it after four years. Maj. Op. at 32. But this explanation is completely at odds with what the conference report itself says. The report says that "[t]he House amendment, *but not the Senate bill*," would limit "the court's authority to award fees at the administrative level" after four years. H.R. CONF. REP. No. 687, 99th Cong., 2d Sess. 5, at 7 (emphasis added). If the Senate conferees truly believed that the bill contained no authority for the award of fees at the administrative level, as the majority suggests, then the conference report makes no sense as written. The conference report can only be read to indicate that the conferees agreed to *retain* the court's authority to award fees at the administrative level without any limitation through a sunset provision.

III.

The statutory language and the legislative history of EHA, as amended by HCPA, show that Congress provided for attorneys fees for parents who prevail in administrative proceedings. I dissent because the result reached in the majority opinion is wholly at odds with this congressional intent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 87-0941

JUDGE STANLEY SPORKIN

FILED JULY 29, 1987

LANI MOORE, *et al.*,
Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

MEMORANDUM

This is a case to collect attorneys' fees and other costs incurred in bringing administrative actions under the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. § 1400 *et seq.* Defendants interpose two defenses—that the Act should not apply retroactively, and that attorneys fees should not be available for administrative proceeings.[1] Because neither of these arguments has merit, the plaintiffs are entitled to summary judgment.

I.

The EHA, enacted in 1975, ensures that handicapped children are given access to public education by providing federal money to assist state and local agencies in educating these handicapped children. Certain parties, such as these plaintiffs, may bring actions to enforce their rights under

[1] Defendants also object to granting attorneys['] fees on several factual grounds—for instance, whether in certain cases the plaintiffs have prevailed on the merits, whether the amounts plaintiffs seek are reasonable, and whether the plaintiffs negotiated fee settlements in good faith. These are issues which must be determined, but which need be determined only after resolution of defendants' legal contention that fees are not properly awardable at all.

the EHA. In July of 1984, the Supreme Court held that attorneys' fees were not available to the prevailing party in such an action. *Smith v. Robinson*, 468 U.S. 992, 1020 (1984). Subsequently, in August 1986, Congress enacted the Handicapped Children's Protection Act of 1986, ("the Act"), Public Law 99-372. This Act effectively overturns the Supreme Court's holding in *Smith v. Robinson*, *supra*, by allowing an award of attorneys' fees to the parents or guardians of handicapped youth who prevail in a special education action. Though passed in late 1986, the Act provided that attorneys' fees would be awardable for any action brought before July 4, 1984, which was pending on July 4, 1984, as well as for any action brought after July 3, 1984.

II.

Defendants[']first argument is that the attorneys' fees provision in the Handicapped Children's Protection Act "should not be enforced retroactively." Memorandum of Points and Authorities in Support of [Defendants'] Motion to Dismiss, or in the Alternative, for Summary Judgment ("Def. Br.") at 7. Specifically, defendants raise two objections. First, they express concern that retroactive application of the Act will offend notions of the "separation of powers" by reversing final Court orders, *id.* at 8, although they do not point to any final court orders which the plaintiffs are attempting to reopen. Second, defendants assert that retroactive application of the fees provision would act as a condition on the grant of federal funds, a condition which they contend they were unaware of when they accepted the funds. Defendants assert that retroactivity thereby impairs the voluntary "contract" between the federal government and the District with respect to EHA funding, *id.*, *citing Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), and thus exceeds Congress's spending power.

Neither of these arguments is persuasive . The Supreme Court has held that it is within the authority of Congress

to pass retroactive legislation, especially where, as here, the legislators are attempting to explicate what they intended in an earlier version of the law. *See Pension Benefits Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In this case, by the later, retroactive Act, Congress was expressing its explicit approval for attorneys' fee awards after the Supreme Court had denied the award of such fees. This type of retroactive clarification is clearly within Congressional authority and does not offend the constitution. Thus, most of the federal district courts that have considered this issue have upheld the retroactive application of the Act. *Rollinson v. Biggs*, 656 F.Supp. 1204 (D.Del. 1987); *Silano v. Tirozzi*, 651 F.Supp. 1021, 1027 (D. Conn. 1987); *School Board of the County of Prince William v. Jerry F. Malone*, 1986-87 EHLR DEC. (CCR) 558:259 (E.D. Va. 1987); *Edward B. v. Rochester New Hampshire School District*, 1986-87 EHLR DEC. (CCR) 558:176 (D. N.H. 1986). *Cf. Lana Abu-Sahyun v. Palo Alto Unified S. Dist.*, 1986-87 EHLR DEC. (CCR) 558:275 (N.D. Cal. 1987).

As to defendants' two more specific points: *first*, defendants have not shown that retroactive application would intrude on the judicial function by dictating a result in any specific judicial decision and thus they have failed to indicate how the notion of "separation of powers" might be transgressed by retroactivity. *Second*, defendants' contract impairment argument misreads *Pennhurst*. *Pennhurst* does not hold that Congress *cannot* retroactively condition the receipt of funds; rather *Pennhurst* deals with the question of Congressional intent and whether such retroactivity was intended in that case. In this case, there is no doubt that Congress intended to allow awards of attorneys' fees to prevailing plaintiffs. Therefore, there is no infirmity in the statute in question.

Finally, it is worth noting that the District of Columbia has reimbursed prevailing plaintiffs in numerous other[ ] cases

brought under the Act. It is disturbing to this Court that the defendant District of Columbia would not have a consistent policy with regard to fee payments—either such payments are unconstitutional as argued here and should not be made; or else they are paid, as in other cases, and the District should not allege their unconstitutionality as it does here.

In summary, I find the retroactive section of the Act in question is not a bar to plaintiffs[']recovery of attorneys' fees.

III.

The defendants[']other argument is that "the Act should not be interpreted to permit the award of attorneys' fees to parents who prevail at the administrative level." Def. Br. at 10. However, Congress manifested its intention that attorneys' fees would be recoverable for administrative proceedings in the clear words of the statute. Specifically, Section 1415(e)(4)(B) reads, "in any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees . . ."[2] Thus, the words of the statute itself support the plaintiffs' position that fees are recoverable for administrative proceedings. *Burpee v. Manchester School District*, 1986-87 EHLR DEC. (CCR) 558:273 (D.N.H. 1987); *Michael F. v. Cambridge School Department*, 1986-87 EHLR DEC. (CCR) 558:269, 270-71 (D. Mass. 1987).

Despite the plain words of the statute, defendants[ ] urge the

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[2] While defendants[ ] may argue for a narrow reading which construes "under this subsection" to refer only to judicial proceedings, the subsection in question contemplates administrative proceedings as well. Subsection (e)(1) of section 1415 reads:

> A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

Court to look at the legislative history of the Act which, they argue, reveals a Congressional intent to deny fees for administrative proceedings. To make this argument, defendants rely on *North Carolina Dept. of Transportation v. Crest Street Community Council*, 107 S.Ct. 336 (1986), wherein the Supreme Court recently held that attorneys' fees under 42 U.S.C. §1988 are to be awarded for administrative proceedings only when those proceedings are part of or followed by a lawsuit. *Id.* at 341. Defendants argue that in passing the Handicapped Act, Congress intended only to make the fees provision coextensive with other fee-shifting statutes. Thus, they reason, now that the Supreme Court has found administrative proceedings not covered under 42 U.S.C. §1988, this Court should similarly find administrative proceedings not covered under the Handicapped Act.

The problem with this argument is that when Congress considered the fees provision at issue here it thought that fees *were* recoverable for administrative proceedings under other fee-shifting statutes. Both the Senate and House reports cite *New York Gaslight Club, Inc., v. Carey*, 447 U.S. 54 (1980), which held that under Title VII, a prevailing party could obtain an award of fees, costs, and expenses incurred in mandatory state and local administrative proceedings, even when no lawsuit was filed. *See* S.Rep.No. 99-112, 99th Cong., 2nd Sess. *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798; H. Rep. No. 99-296, 1st Sess. (Oct. 2, 1985).

Thus, while it might be true that Congress wanted the Handicapped Act to parallel these other statutes, it wanted to do so to *ensure* that attorneys' fees would be awarded for administrative proceedings, not to defeat such awards. For instance, the Senate Report says, "Section 2 provides for the award of reasonable attorney's fees to prevailing parents in EHA civil actions and in administrative proceedings to parents in certain specified circumstances," S.Rep.No. 99-112, 99th Cong., 2nd Sess. *reprinted in* 1986 U.S. Code Cong. & Admin. News 1799, 1800, and later, "The committee intends

that S. 415 will allow the Court, but not the hearing officer, to award fees for time spent by counsel in mandatory EHA administrative proceedings." *Id.* at 1804. The House Report is in accord, stating, for instance, that:

> . . . if a parent prevails on the merits at an administrative proceeding (and the agency does not appeal the decision), the parent may be awarded reasonable attorneys' fees, costs and expenses incurred in such administrative proceeding. Usually, the amount of such fees, costs, and expenses will be agreed to by the public agency. If no agreement is possible, the parent may file a law suit for the limited purpose of receiving an award of reasonable fees, costs and expenses.

H. Rep. No. 99-296, 1st Sess. 5 (Oct. 2, 1985). In short, there is little doubt here what Congress intended in passing the Handicapped Act—it intended fees to be recoverable for administrative proceedings. Nothing in *North Carolina Transportation*, *supra*, does—or for that matter, could—change Congress's clear intention.

Finally, I also note that the United States Department of Education has issued an opinion letter on this subject. The letter cites the language from the legislative history outlined above and concludes that the quoted language "indicate[s] that fees incurred at the administrative 'due process' level are subject to reimbursement . . ." Letter of G. Thomas Bellamy, Director, Office of Special Education Programs, of the U.S. Department of Education, to Mr. and Mrs. Ralph Knipe (November 12, 1986), *reprinted in* EHLR Supplement No. 184, 211:425, 426 (January 16, 1987).

Thus, the plaintiffs are entitled to recover their attorneys' fees for the proceedings in question notwithstanding the fact that these proceedings were administrative, not judicial, in nature. *Keay v. Bismark School District*, 1986-87 EHLR DEC. (CCR) 558:317 (E.D. Mo. 1987); *Burpee*, *supra*; *Michael F.*, *supra*; *Malone*, *supra*. *Contra Rollinson v. Biggs*, C.A.

No. 80-165 MMS (D. Del., May 22, 1987) (order denying attorneys' fees for administrative proceedings).

IV.

The legal obstacles to plaintiffs' relief having thus been settled, the only remaining issue is the determination of how much money is due and owing to each plaintiff still in the case.[3] Nowhere in the pleadings do the plaintiffs outline in a clear and concise manner the nature of each plaintiff's claim, the resolution of that claim, the time spent on the claim, the billing rate, and thus the amount due that plaintiff. Therefore, though plaintiffs are entitled to judgment in their favor, final relief cannot be entered at this time. Rather, plaintiffs will be given thirty (30) days from the date of this Order to file affidavits with the Court outlining in detail, on a case by case basis, the information requested above. The defendants will then have twenty (20) days to raise (or re-raise) objections—again on a case by case basis—to the amount of plaintiffs' requested relief. In this manner, I will be able to determine exactly what relief is appropriate for each plaintiff.

The parties are, of course, welcome to attempt to reach agreement between themselves during this time period, as well. I will withhold a ruling on plaintiffs' motion for Rule 11 sanctions until such time as the case is completed.

An appropriate Order accompanies this Memorandum.

DATED: JULY 28, 1987

/s/ Stanley Sporkin

STANLEY SPORKIN
United States District Judge

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[3] At the July 1, 1987, motions hearing, the parties appeared to agree that several of the plaintiffs had received fee awards from the government and were therefore no longer part of this action. The Court has not yet received a notice of dismissal from these plaintiffs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 87-0941

JUDGE STANLEY SPORKIN

FILED JULY 29, 1987

LANI MOORE, *et al.*,
Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

ORDER

For the reasons outlined in the Memorandum dated July 28, 1987, it is this 28th day of July, 1987, hereby

ORDERED that defendants' motions to dismiss and to sever be denied and it is further

ORDERED that plaintiffs' motion for summary judgment be granted and it is further

ORDERED that plaintiffs file detailed affidavits, within thirty (30) days of the date of this Order, outlining, on a case by case basis, the following information:

1. the nature of the claim;
2. whether the plaintiff has prevailed on the merits;
3. how many hours were spent on the claim and how this time was spent;
4. the billing rate for this time;
5. the total amount claimed;

The defendants shall have twenty (20)days from the time the plaintiffs' affidavits are filed to interpose any objections to the amounts requested.

/s/ Stanley Sporkin

STANLEY SPORKIN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1988

No. 88-7003
CIVIL ACTION No. 87-00941

LANI MOORE, *et al.*

v.

DISTRICT OF COLUMBIA, *et al.*,
Appellants.

Before: WALD, *Chief Judge*, ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, *Circuit Judges.*

ORDER

Appellees' Suggestion for Rehearing *En Banc* and the response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that this appeal will be considered and decided by the court sitting *en banc*.

A future order will govern further proceedings.

Per Curiam
For The Court:

CONSTANCE L. DUPRE, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Robinson did not participate in this order.

FILED: AUGUST 24, 1989

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1989

No. 88-7003
CIVIL ACTION No. 87-00941

LANI MOORE, *et al.*

v.

DISTRICT OF COLUMBIA, *et al.*,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WALD, *Chief Judge*, MIKVA, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE and THOMAS, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel before the Court *en banc*. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court *en banc*, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

DATE: JUNE 19, 1990

Opinion for the Court *en banc* filed by Circuit Judge Edwards

20 U.S.C. § 1415 Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to intiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may being an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child

shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that—

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonable comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. § 790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(Pub. L. 91-230, title VI, § 615, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788, and amended Pub.L. 99-372, §§ 2, 3, Aug. 5, 1986, 100 Stat. 796, 797; Pub. L. 100-630, title I, § 102(e), Nov. 7, 1988, 102 Stat. 3294.)

No. 90-461

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DISTRICT OF COLUMBIA, *et al.*,
Petitioners

v.

LANI MOORE, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Education of the Handicapped Act, 20 U.S.C. 1400 et seq., authorizes the award of attorneys' fees to parents of handicapped children who prevail on the merits in administrative proceedings.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-461

DISTRICT OF COLUMBIA, *et al.*,
Petitioners

v.

LANI MOORE, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

1. The Education of the Handicapped Act (EHA), 20 U.S.C. 1400 et seq., provides that, as a condition of obtaining federal financial assistance, a state must "ha[ve] in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. 1412(1). A state must also ensure that a parent or guardian will have "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement" of a handicapped child. 20 U.S.C. 1415(b)(1)(E).

A parent or guardian who makes such a complaint is entitled to "an impartial due process hearing" before the state or local education agency. 20 U.S.C. 1415(b)(2).

The EHA specifically grants parents "the right to be accompanied and advised by counsel" throughout the administrative process. 20 U.S.C. 1415(d)(1). "Any party aggrieved" by an administrative action may seek judicial review by filing a civil action in state court or in a United States District Court. 20 U.S.C. 1415(e)(2).

When the EHA was first enacted, it contained no explicit provision for attorneys' fees. In 1986, Congress enacted the Handicapped Children's Protection Act, Pub. L. No. 99-372, 100 Stat. 796 (HCPA), which, among other things, amended the EHA to authorize the award of attorneys' fees.[1] Specifically, the HCPA added 20 U.S.C. 1415(e)(4)(B), which provides:

> In any action or proceeding brought under this subsection, the court in its discretion may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

2. Respondents are nine handicapped students and their parents or guardians. Each was initially denied an appropriate special education placement by petitioners, who are the District of Columbia and the superindendent of its public schools. After one or more administrative hearings under the EHA, each respondent prevailed, achieving the placement initially refused by petitioners. Respondents then requested that petitioners reimburse them for attorneys' fees and costs incurred in the administrative proceedings. When petitioners refused, respondents brought this action in the United States District Court for the District of Columbia.

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[1] Congress enacted the HCPA in response to this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984), which held that the EHA provided the exclusive remedy for a wide range of claims by handicapped children. Parents were thus precluded from filing claims under related statutes that provided for attorneys' fees. The HCPA not only overruled this holding of *Smith v. Robinson*, see 20 U.S.C. 1415(f), but added an independent provision for attorneys' fees to the EHA.

The district court awarded fees. Pet. App. 68a-74a. A divided panel of the court of appeals reversed. *Id.* at 25a-60a. The panel majority concluded that because respondents prevailed in the administrative proceedings, without having to resort to court, they were not entitled to attorneys' fees under the HCPA. Judge Edwards dissented. *Id.* at 61a-67a.

3. The court of appeals granted rehearing en banc (Pet. App. 76a) and unanimously overturned the panel's ruling.[2] The unanimous en banc court of appeals held that respondents are entitled to attorneys' fees for the work done in connection with the administrative proceedings. *Id.* at 1a-24a.[3]

a. The court of appeals concluded that this interpretation follows from the plain language of the HCPA. Pet. App. 5a-14a. The court of appeals noted that Section 1415(e)(4)(B) uses the phrase "action or proceeding" and stated that "[w]e are at a loss to give meaning to the distinction between 'action' and 'proceeding' short of inferring that Congress meant to authorize fees for parents who prevail either in a *civil action* or in an *administrative proceeding*" (Pet. App. 6a; emphasis in original). The court of appeals further noted that "EHA and HCPA unambiguously use the terms 'action' and 'proceeding' in several places to distinguish between the administrative and judicial phases of EHA litigation." *Ibid.*, citing 20 U.S.C. 1415(e)(2), 1415(e)(4)(D).

The court of appeals also relied on the plain language of another provision of the HCPA, 20 U.S.C. 1415(e)(4)(D).

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[2] Judge Williams, who had been a member of the panel majority, joined the opinion of the en banc court.

[3] Petitioners' appeal to the court of appeals also challenged the amount of fees awarded. The en banc court of appeals remitted this issue to the panel. Pet. App. 24a. The panel subsequently affirmed the district court's award of fees in its entirety. *Moore v. District of Columbia*, No. 88-7003 (Sept. 20, 1990).

Section 1415(e)(4)(D) provides that attorneys' fees are not to be awarded for services performed after a qualifying offer of settlement is made to a parent or guardian, if the relief finally awarded is no more favorable than the offer of settlement.[4] The court of appeals noted that Section 1415(e)(4)(D)(iii) provides that either "the court or [the] administrative officer" is to compare the settlement offer with the "relief finally obtained." Pet. App. 10a. The court of appeals then reasoned as follows:

> Because an administrative officer would have occasion to make th[is] comparative finding . . . only in the event that the parent achieves 'final[]' relief in an administrative proceeding, HCPA clearly contemplates that the issue of attorney fees will survive an otherwise successful outcome for the parent at the administrative stage.

Ibid. (footnote omitted; last brackets in original).

The court of appeals also noted that Section 1415(e)(4)(D)(i) specifies certain time limits for a qualifying settlement offer: "within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins." The court reasoned that "[i]f a parent were entitled to fees *only* upon pre-

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[4] 20 U.S.C. 1415(e)(4)(D) provides:

> No award of attorneys' fees . . . may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement . . . if—
>
> (i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days after the proceeding begins;
>
> (ii) the offer is not accepted within ten days; and
>
> (iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

vailing in court . . . the independent ten-day limit applicable 'in the case of an administrative proceeding' would be meaningless" (Pet. App. 11a; emphasis in original).

Finally, the court of appeals relied on the plain language of Section 4 of the HCPA, which requires the Comptroller General to "conduct a study of the impact of" the attorneys' fees provision. Pub. L. 99-372, 100 Stat. 797 (uncodified). The court noted that Congress directed that this study identify the number of written decisions under the provisions of the HCPA that provide for administrative hearings, and the prevailing party in each decision. Pet. App. 12a. The court of appeals stated that it "would be difficult . . . to explain how this information would be relevant to the study were the prevailing parties in these administrative proceedings not entitled to recovery of their fees." *Ibid.*

b. Although the court of appeals concluded that its interpretation of the HCPA "best comports with the text and structure of HCPA" (Pet. App. 14a), it also examined the legislative history. The court noted that petitioners do not dispute that the House of Representatives sought to authorize parents who prevail in administrative proceedings to obtain fees. *Id.* at 15a. The court stated that the relevant portions of the Senate report, and the unequivocal remarks of "[t]he only Senator to address the question during the floor debate" (*id.* at 18a), specifically stated that fees should be awarded to parents who prevail in administrative proceedings.

The court of appeals also concluded that "[t]he disposition of the respective House and Senate bills in conference furnishes the strongest evidence that *both* chambers intended HCPA to authorize fees for parents who prevail in EHA administrative proceedings." Pet. App. 21a (emphasis in original). Specifically, the House bill had contained, "[a]s a concession to those Representatives who opposed awarding fees to parents who prevail

at the administrative level" (*id.* at 21a), a provision that the authority to award fees in these circumstances would expire after four years. See *ibid.* The conference report deleted this "sunset" provision with the following explanation (H.R. Conf. Rep. 687, 99th Cong., 2d Sess 7 (1986)):

> The House amendment, but not the Senate bill, sunsets the court's authority to award fees at the administrative level . . . .
>
> The House recedes.

The court of appeals concluded that this action by the conference committee revealed the shared understanding of the House and Senate that "the resulting bill retains without restriction 'the court's authority to award fees at the administrative level.'" Pet. App. 22a.

In addition, the court of appeals noted the post-conference statements by House conferees who had opposed awarding fees to parents who prevail in administrative proceedings. Two of those members stated on the House floor, just before the House approved the conference report, that the bill authorized fee awards in those circumstances; that they were disappointed that it did; but that they nevertheless on balance supported the bill and urged their colleagues to vote for it. See Pet. App. 22a-23a. The court of appeals stated (*id.* at 23a):

> Unless we are to assume that these Representatives totally misunderstood what transpired in conference . . . it is clear from their statements that the conferees understood deletion of the House sunset provision as removing any limit on the court's authority to award fees to parents who prevail at the administrative level.

ARGUMENT

The decision of the unanimous en banc court of appeals is correct. As petitioners concede (Pet. 24), there is no conflict in the circuits on the question presented by this case: six other courts of appeals (four in holdings and two in dicta) have addressed the question presented here, and each of them has reached the same result as the court below. This Court has recently declined to review the question presented here. *Muscogee County School District v. Mitten*, cert. denied, 110 S. Ct. 1117 (1990) (No. 89-905). See also *Venus Independent School District v. Shelley C.*, cert. denied, 110 S. Ct. 729 (1990) (No. 89-788). Further review remains plainly unwarranted.

1. Petitioners' principal contention (Pet. 12-14) is that the court of appeals' decision is inconsistent with *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6 (1986). *Crest Street* concerned 42 U.S.C. 1988, which authorizes the award of attorneys' fees to parties who prevail under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and certain other civil rights statutes. The Court in *Crest Street* held that Section 1988 does not authorize the award of fees to parties who prevail in administrative proceedings under Title VI.

Crest Street, however, did not concern the EHA. It addressed a different statute—a statute that has different language, a different structure, and different legislative history. Every other court of appeals that has addressed the issue presented by this case had *Crest Street* before it; all of them agreed (with no dissenting votes) with the result reached by the court of appeals in this case.

a. The language of Section 1988, the provision interpreted in *Crest Street*, differs from the language of the HCPA. Section 1988 authorizes the award of fees in

"any action or proceeding to enforce a provision of" Title VI and other enumerated statutes. 42 U.S.C. 1988. The Court in *Crest Street* placed great weight on the phrase "to enforce," noting that an independent action for fees, brought after a party obtained complete relief in administrative proceedings, was not an action "to enforce" Title VI or one of the underlying civil rights laws. As the Court explained (*Crest Street*, 479 U.S. at 12; emphasis by the Court):

> [Section 1988] states that *in the action or proceeding to enforce* the civil rights laws listed . . . *the court* may award attorney's fees. The case before us is not, and was never, an action to enforce any of these laws. On its face, § 1988 does not authorize a court to award attorney's fees except in an action to enforce the listed civil rights laws.

Section 1415(e)(4)(B) does not use the words "to enforce"; rather, it refers to "any action or proceeding brought under this subsection." As the Court ruled in *Crest Street*, an independent action for fees under section 1988 is not an action "to enforce" one of the enumerated civil rights laws. By contrast, however, an independent action for fees under Section 1415(e)(4)(B) *is* "an[] action or proceeding under this subsection." As the court of appeals explained, Congress envisioned that an independent action for fees would be brought under subsection (e)(4). "[T]he text and structure of HCPA directly support the inference that Congress intended section 1415(e)(4) to provide an independent cause of action for fees." Pet. App. 13a; see *id.* at 13a-14a.

b. The structure of the EHA also differs significantly from that of the statutes involved in *Crest Street*. As the court of appeals stated, "[a]dministrative proceedings occupy a central place in the remedial framework established by EHA." Pet. App. 6a, citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988); see also *Smith v. Robinson*, 468 U.S. 998, 1009-13 (1984). In particular, the EHA gen-

erally requires the exhaustion of administrative remedies. See *Honig*, 484 U.S. at 326-27; *Smith v. Robinson*, 468 U.S. at 1014. The statutes enumerated in Section 1988, by contrast, do not require the exhaustion of administrative remedies.

It would be logical for Congress to distinguish, for purposes of awarding fees in administrative proceedings, between claimants who are required to resort to administrative proceedings and those who are not. Arguably claimants who are required to resort to administrative proceedings have a better claim to be reimbursed for fees than claimants who have an option whether to invoke administrative remedies and have decided that it is in their interest to do so. Cf. *Crest Street*, 479 U.S. at 14.

Moreover, the legislative history shows that Congress did in fact attach significance to this distinction. The Senate report (as we noted, petitioners do not dispute that the House rejected their interpretation of the HCPA) states the following (S. Rep. No. 112, 99th Cong., 1st Sess. 13-14 (1985)):

> The committee . . . intends that [the attorneys' fees provision] should be interpreted consistent with fee provisions of statutes such as title VII of the Civil Rights Act of 1964 which authorizes courts to award fees for time spent by counsel in mandatory administrative proceedings under those statutes. See *New York Gaslight v. Carey*, 447 U.S. 54 (1980) (compare *Webb v. Board of Education for Dyer County*, [471 U.S. 234 (1985)] in which the court declined to award fees for work done at the administrative level because the statute under which the suit was brought did not require the exhaustion of administrative remedies before going to court).

In *New York Gaslight v. Carey*, which interpreted the attorneys' fees provision of Title VII of the Civil Rights Act of 1964—a statute that does require exhaustion—

this Court stated that fees were to be awarded to parties who prevail in administrative proceedings. See, *e.g.*, 447 U.S. at 66, quoted at page 12, *infra*. The legislative history confirms, therefore, that when Congress enacted the HCPA, it distinguished between statutes like the EHA and Title VII, which do require exhaustion—and in connection with which fees are to be awarded to parties who prevail in administrative proceedings—and statutes like those involved in *Crest Street*. See *Webb v. Board of Education*, 471 U.S. 234, 240-41 (1985) (distinguishing between Title VII and Section 1988 on this ground).[5]

c. The Court in *Crest Street* did not rely solely on the plain language of Section 1988; indeed, the Court said that that language only "suggests the answer to the question" whether fees are available. 479 U.S. at 12. The Court then turned to the legislative history of Section 1988, which confirmed that Congress did not intend to award fees to parties who prevailed in administrative proceedings. *Id.* at 12-13. In contrast, the legislative history of the HCPA demonstrates beyond question that Congress intended to authorize the award of fees to such parties.

As the court of appeals explained, the legislative history of the HCPA shows that Congress focused on the

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[5] There is another significant structural difference between the EHA and the statutes covered by Section 1988. A party claiming rights under a Section 1988 statute will seldom, if ever, be a *defendant* in administrative proceedings initiated by the government. By contrast, as this Court has noted, parties claiming rights under the EHA may find themselves in that position. "While many of the EHA's procedural safeguards protect the rights of parents and children, schools can and do seek redress through the administrative review process." *Honig v. Doe*, 484 U.S. 305, 327 (1988).

The desire to provide fees for a claimant who is brought into proceedings involuntarily is another reason why Congress might have intended to permit the award of fees under Section 1415 (e)(4)(B) in circumstances in which an award would not be authorized under Section 1988.

very issue presented in this case and deliberately decided to authorize fee awards to parties who prevail in administrative proceedings. See Pet. App. 15a-24a. For example, the word "proceeding" was added to Section 1415(e)(4)(B) precisely to authorize fee awards in these circumstances. See, *e.g.*, 131 Cong. Rec. 31372 (1985). Indeed, the "sunset" provision (subsequently dropped by the conference committee) accomplished its purpose—providing for the expiration of authority to award fees to parties who prevail in administrative proceedings—by "striking out 'action or proceeding' and inserting in lieu thereof 'civil action'." 131 Cong. Rec. 31370 (1985) (H.R. 1523, Section 6a).

In addition, the conference report and post-conference proceedings powerfully support the court of appeals' decision. As the court of appeals explained, the conference report admits of only one interpretation—that both Houses understood that fees could be awarded to parties who prevail in administrative proceedings. Moreover, as the court of appeals stated, the House conferees who initially opposed the award of fees in these circumstances returned to the House and informed their colleagues that, to their regret, the conference bill provided for the award of fees at the administrative level—but that the bill should be enacted nonetheless. This is overpowering evidence that the court of appeals' interpretation is correct. These members of the House had no incentive to say that the bill provided for fees in these circumstances, unless it was universally understood that the bill in fact did so.

Finally, as the court of appeals explained, *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), played a prominent role in the legislative history of the HCPA. In *New York Gaslight*, this Court relied on the use of the phrase "action or proceeding" in the attorneys' fees provision of Title VII of the Civil Rights Act of 1964, Section 706(k) (42 U.S.C. 2000e-5(k)), in holding that Title VII permits the award of fees to parties who pre-

vail in administrative proceedings and bring an action in court only to obtain fees. See *New York Gaslight*, 447 U.S. at 61:

> [T]he words of § 706(k) leave little doubt that fee awards are authorized for legal work done in "proceedings" other than court actions. Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings.

The reports of both Houses on the bill that became the HCPA, as well as the floor debate, cite *New York Gaslight* as a model for how the attorneys' fees provisions of the HCPA are to be interpreted. See, *e.g.*, S. Rep. No. 112, 99th Cong., 1st Sess. 13-14 (1985); H.R. Rep. No. 296, 99th Cong., 1st Sess. 5 (1985); 131 Cong. Rec. 21392 (1985) (remarks of Sen. Simon).

Petitioners suggest, correctly, that the Court in *Crest Street* questioned some of the analysis of *New York Gaslight*. See 479 U.S. at 14-15. But the Court in *New York Gaslight* was as explicit as it could be in stating that Title VII authorizes the award of fees to parties who prevail in administrative proceedings:

> [T]he availability of a federal fee award for work done in state [administrative] proceedings . . . should not depend upon whether the claimant ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees.

447 U.S. at 66. The Court then reiterated this understanding of Title VII in *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 451 (1982), which cited *New York Gaslight* for the proposition that "a claimed entitlement to attorney's fees is sufficiently independent of the merits action under Title VII to support a federal suit 'solely to obtain an award of attorney's fees

for legal work done in state and local proceedings'[]." 455 U.S. at 451 n.13, quoting 447 U.S. at 66.

When Section 1415(e)(4)(B) was enacted, *Crest Street* had not yet been decided. *New York Gaslight*, and its reaffirmation in *White*, were the dominant features of the legal landscape in this area. This Court has consistently emphasized that in interpreting language enacted by Congress, the focus must be on " 'the contemporary legal context' " (*Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 379, 381 (1982), quoting *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979)), including "judicial decisions construing comparable language" (*Merrill Lynch*, 456 U.S. at 379). *See also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 658 (1981); *Brown v. GSA*, 425 U.S. 820, 828 (1976).

As the court of appeals said, even apart from the clear evidence in the legislative history that Congress intended to follow the approach of *New York Gaslight*, it is "both 'appropriate [and] . . . realistic *to presume* that Congress was thoroughly familiar with' the Court's decision in *Gaslight* 'and that it expected its enactment to be interpreted in conformity with' that precedent." Pet. App. 8a, quoting *Cannon*, 441 U.S. at 699 (emphasis, brackets, and ellipsis by the court of appeals). Whatever significance *Crest Street* might have for a statute enacted today, it is anachronistic to use it as petitioners do in the interpretation of the HCPA.

2. Petitioners also challenge the court of appeals' interpretation of the HCPA on the ground that no other attorneys' fees provision authorizes fee awards for parties who prevail in administrative proceedings. See, *e.g.*, Pet. i, 12. But petitioners fail to substantiate their premise that no other attorneys' fees statute authorizes the award of fees in these circumstances.

There are more than one hundred statutes providing for the award of attorneys' fees. See *Marek v. Chesny*, 473 U.S. 1, 43-50 (1985) (appendix to the opinion of Brennan, J., dissenting). In connection with the vast majority of those statutes, the question of fee awards at the administrative level has not yet been resolved. Indeed, it appears that this question is seldom litigated. This Court has decided the question only in connection with Section 1988. *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, *supra*; *Webb v. Board of Education*, *supra*. Petitioners do not cite a single example of another attorneys' fees provision, apart from Section 1988, that denies fees to a party who prevails in administrative proceedings.

Contrary to petitioners' suggestion, nothing in *Crest Street* indicates the Court's intention to adopt a unitary approach to this issue in connection with all attorneys' fees statutes. *Crest Street* resolved the issue on the basis of the specific language and legislative history of Section 1988. As the court of appeals showed, the language, structure, and history of the HCPA dictate a different interpretation of that statute.

3. Petitioners concede that there is no conflict among the court of appeals on the issue presented by this case. Pet. 24. Four other courts of appeals have held that fees are available to parents who prevail in administrative proceedings under the EHA. *Shelly C. v. Venus Independent School District*, 878 F.2d 862, 863 (5th Cir. 1989), cert. denied, 110 S. Ct. 729 (1990); *Duane M. v. Orleans Parish School Board*, 861 F.2d 115 (5th Cir. 1989); *Eggers v. Bullit County School District*, 854 F.2d 892, 898 (6th Cir. 1988); *McSomebodies v. Burlingame Elementary School District*, 886 F.2d 1558 (9th Cir. 1989), as supplemented, 897 F.2d 974 (1990); *Mitten v. Muscogee County School District*, 877 F.2d 932, 934-35 (11th Cir. 1989), cert. denied, 110 S. Ct. 1117 (1990). Two other courts of appeals have reached the same con-

clusion in dicta.[6] *Counsel v. Dow*, 849 F.2d 731, 740 n. 9 (2d Cir.), cert. denied, 109 S. Ct. 391 (1988); *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58, 62 (3d Cir.), cert. denied, 109 S. Ct. 366 (1988). The en banc court of appeals was unanimous in this case, and there have been no dissenting votes in any of the other courts of appeals.

4. We note also that the court of appeals' holding is consistent with the position taken by the Department of Education, the agency responsible for administering the EHA, both before and after the HCPA was enacted. As the court of appeals discussed, while Congress was considering the HCPA, the Secretary of Education advised Congress that "he was dissatisfied with the version of the HCPA enacted by the Senate"—the version that, according to petitioners, adopted their position—"because '[t]he court could also award fees for administrative proceedings *where no court case resulted so long as the parents prevailed in those proceedings.*'" Pet. App. 23a, quoting letter from Secretary of Education Bennett to Representative Bartlett (Sept. 10, 1985) (reproduced at Resp. C.A. Br. Add. A-11 to A-12)[7] (emphasis by the court of appeals). After the HCPA had passed both Houses, Secretary Bennett "reiterated this concern, but nonetheless urged that the bill be signed into law." Pet. App. 23a; see Resp. C.A. Br. Add. A-15 to A-17. As the court of appeals explained, the Secretary's statements are a significant aspect of the legislative history, especially because, if "the Secretary misapprehended the effect of

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[6] Although these statements were dicta, there is reason to believe that they reflect the considered judgments of these courts of appeals. Both cases involved the interpretation of the HCPA. In addition, both cases decided issues closely related to the question whether fees are available to parties who prevail in administrative proceedings.

[7] "Resp. C.A. Br. Add." refers to the addendum to the brief we filed before the en banc court of appeals.

HCPA on this point, Congress would have had a strong institutional incentive to correct him in order to forestall any veto threat." Pet. App. 24a, citing *Zuber v. Allen*, 396 U.S. 168, 192 (1969), and *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982).

Moreover, in a series of opinion letters issued since the enactment of the HCPA, the Department of Education has confirmed this view. See Resp. C.A. Br. Add. A-18 to A-24. This Court has made clear that the views of the Department of Education are entitled to deference in interpreting the EHA. See *Honig*, 484 U.S. at 325 & n.8.

5. Finally, petitioners suggest no reason for believing that this is a case of extraordinary importance, and there is evidence suggesting that it is not. As we noted, when Congress enacted the HCPA, it directed the General Accounting Office to study the effect of the attorneys' fees provisions. See page 5 *supra*. The GAO study was issued in 1989. *Special Education: The Attorney Fees Provision of Public Law 99-372* (1989).

The GAO reported that throughout the nation, in fiscal 1988, there were only 763 administrative proceedings in which parents prevailed. *Special Education* at 3. Parents were represented by attorneys in only 54% of all administrative proceedings in fiscal 1988 (although parents represented by counsel prevailed at a higher rate than parents who lacked representation). See *id.* at 25, 26. The fee awards involved in those proceedings will almost always be small: the total fee award for the administrative proceedings in the nine cases involved here, for example, was $29,357.47. *Moore v. District of Columbia*, 674 F. Supp. 901, 910 (D.D.C. 1987), aff'd, No. 88-7003 (D.C. Cir. Sept. 20, 1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Reply to Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

For the reasons set forth below, the Opposition fails to demonstrate that review by this Court is unwarranted. On the contrary, it provides powerful evidence that the well-reasoned opinion of Judge Friedman faithfully applies the principles of statutory construction that have been established by this Court.

I. THE STATUTORY LANGUAGE.

In defending the *en banc* opinion's analysis of the statutory language, respondents have abandoned two of their successful arguments below: (1) the terms "action or proceeding" in the basic fee-shifting provision (1415(e)(4)(B)) must be read in isolation; and (2) Congress mistakenly used the term "subsection" when it specified that fees may be awarded in "any action or proceeding brought under this subsection." See Pet. App. at 6a, 12a-14a. Respondents thus have implicitly conceded that important aspects of the *en banc* opinion are seriously flawed and contradict *Crest Street*. *See North*

North Carolina Department of Transp. v. Crest Street Community Council, Inc., 479 U.S. 6, 15 (1986); *id.* at 20-21 (Brennan, J., dissenting). As we have shown, the language of the EHA, as amended by the HCPA, authorizes civil actions only by parties aggrieved by an administrative decision (§ 1415 (e)(2)); it does not authorize civil actions for any purpose, including fees, at the behest of parents who prevail in administrative proceedings brought under subsections (b) and (c) of the EHA. Pet. at 13-18; See Pet. App. at 29a-39a.

II. THE LEGISLATIVE HISTORY.

As the Opposition underscores, the *en banc* court's analysis of the legislative history of the HCPA rests in substantial measure on isolated fragments of that history and on inferences from that history that this Court ruled improper in *Crest Street*. Insofar as the Senate is concerned, the Opposition urges: (1) the Senate Report's reference to *New York Gaslight Club, Inc., v. Carey*, 447 U.S. 54 (1980), must be read as endorsing the *dictum* of that case, as well as its holding; and (2) the expansive view of the scope of the Senate bill expresed by Senator Simon, in his first year in the Senate in 1985, must be accorded controlling weight. This is so even though every other Senator who spoke in 1985 and every Senator, including Senator Simon, who spoke in 1986 described the bill as authorizing fees for parents who must go to court to enforce their child's right to an education and for parents who prevail in a civil action brought for that purpose. Both arguments flatly contradict *Crest Street* (479 U.S. at 12-13); and both defy common sense.

Insofar as the House is concerned, the Opposition, like the *en banc* opinion, places controlling weight on views expressed in 1985 and on views expressed by only two House members (Representatives Bartlett and Jeffords) in 1986 after the conference. The Opposition urges that the views expressed by two members in 1986 must mean that it was "universally understood" that the HCPA authorized an action for fees alone. Opp. at 11.

However, there was no such universal understanding of the legislation either in the Senate, as already discussed, or in the House. For example, several House members, who were also members of its Rules Committee, described the legislation on the very day it was enacted in the House as follows:[1]

> [Mr. Beilenson:] S. 415 would overturn . . . Smith v. Robinson. That decision . . . rendered courts unable to award attorneys' fees to families who sue school districts which fail to provide appropriate educational opportunities for handicapped children. Up until the Supreme Court's ruling, parents . . . who successfully sued under the Education for the Handicapped Act could be awarded attorneys' fees under other civil rights statutes . . . . The Supreme Court ruled, however, that attorneys' fees may no longer be awarded in cases brought under the Education for the Handicapped Act, since the act did not so specifically provide.
>
> The conference report . . . would restore the ability to recover attorneys' fees . . . .
>
> [Mr. Quillen:] The conference report . . . merely overturns the decision of the Supreme Court . . . to authorize the award of reasonable attorney fees to prevailing parties who file suit under the act.
>
> [Mr. Walker:] . . . [I]t would be my understanding that we are simpy allowing parents of handicapped children . . . access to court to ensure the[m] that if they bring a legitimate case that reasonable attorneys' fees can be awarded . . . .

132 Cong. Rec. H4833-34 (July 24, 1986). Floor manager Williams, moreover, specified after the conference that the HCPA was to be interpreted like 42 U.S.C. § 1988 and that

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[1] For reasons not related to the question before the Court, a special resolution initiated by the House Rules Committee was needed to permit consideration of the conference bill. The remarks quoted in the text were made in support of that measure, House Resolution 505, which was passed by a voice vote just before the HCPA was approved.

it provided fees only in circumstances permitted by other fee-shifting statutes. See Pet. at 23.

As a consequence, it cannot be said that there was a universal understanding that independent fee actions were authorized. On the contrary, it appears that Representatives Bartlett and Jeffords did not understand what had transpired at the conference,[2] unless, of course, floor manager Williams misunderstood not only what had happened at the conference but also what Congress had done when it enacted §1988. Furthermore, the position that the views expressed by two House members in 1986 reflect *Congress'* intent requires the conclusion that the senior Senators who addressed the bill that became the HCPA did not understand what they had enacted on prior occasions and carelessly misled their colleagues about the scope of the bill.[3]

III. THE IMPORTANCE OF THE QUESTION PRESENTED FOR REVIEW.

The Opposition suggests that this case is unimportant because the amount of money involved is not great. The importance of this case does not, however, depend solely on the extent to which independent fee actions financially disable schools from accomplishing their important educational mission. On the contrary, review is necessary for several other reasons. First, given the erroneous interpretation of *Crest Street* in the HCPA fee cases, this Court must once again provide

[2] Representatives Bartlett and Jeffords did not sign the conference report. Futhermore, according to a 400-page doctoral dissertation submitted by respondents in the court of appeals, "[t]here was no meeting of House and Senate conferees during conference. Rather the compromise was negotiated by staff." West, The Handicapped Children's Protection Act of 1986: A Case Study of Policy Formation at 257.

[3] In view of the consistent interpretation of the legislation in the Senate (excepting, of course, Senator Simon in 1985), Judge Friedman correctly ruled that the elimination of the "sunset" provision at the conference may simply have reflected the Senate's position that there was no need to terminate authority that had not been granted. See Pet. App. 56a.

guidance to the lower courts on the construction of legislation. Second, review is necessary to avoid further confusion in Congress over the law governing fee-shifting statutes. Third, this Court should grant review to effect what Congress enacted and intended: a fee provision that affords handicapped children the same right to fees given other civil rights litigants.[4] Fourth, the recent recognition of an independent fee action has undermined the informal, cooperative mechanism that Congress established in the EHA for ensuring that handicapped children receive a free appropriate public education. See Brief *Amici Curiae* of National School Boards Association, *et al.* Finally, opinions like that for which review is sought here will increasingly result in diverting scarce educational dollars to litigation expenses, not only for fee awards but also for counsel now needed by school districts at the administrative level.[5]

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[4] The Opposition states (Opp. at 14) that we have wrongly suggested that *Crest Street* established this Court's intention to impose uniformity on fee-shifting statutes. This is not so. In *Crest Street*, this Court merely recognized — unanimously — that Congress modeled § 1988 on the fee-shifting provision of Title VII. *Crest Street*, *supra*, 479 U.S. at 15; *id.* at 20-21 (Brennan, J., dissenting). The fact that *Crest Street* considered only two fee-shifting statutes does not, however, mean that Congress does not strive for uniformity. In the case of the HCPA, the legislative history plainly indicates that both Houses of Congress intended fee parity with other beneficiaries of fee-shifting statutes (although apparently some House members, particularly in 1985, could not distinguish between *Carey's* holding and its *dictum*). For example, Senator Weicker, in introducing his initial bill to overturn *Smith v. Robinson*, stated that the bill "carefully follows the language" of the Civil Rights Attorneys' Fees Awards Act of 1976, now codified at 42 U.S.C. § 1988. 130 Cong. Rec. S9078-79 (July 24, 1984).

[5] In this respect, it should be noted that the first appellate court decision authorizing an independent fee action was decided on August 28, 1988. See *Eggers v. Bullitt County School District*, 854 F.2d 892 (6th Cir. 1988). Accordingly, the GAO Report on *fiscal* 1988 fee awards cited in the Opposition (Opp. at 16) cannot reflect the financial impact of the appellate court decisions recognizing independent fee actions.

IV. MISCELLANEOUS ARGUMENTS.

The Views of the Department of Education. The views of the DOE set forth in the Opposition do not establish that Congress enacted, or intended to enact, an independent fee action. Thus, the letter from Secretary Bennett to Representative Bartlett, described in the Opposition (Opp. at 15) was a response to a September 5, 1985, letter from Representative Bartlett in which he interpreted the "action or proceeding" language in the Senate bill as authorizing an independent fee action. By contrast, in an earlier letter to Senator Weicker, dated July 30, 1985, Secretary Bennett expressed no opposition to his Senate bill on the grounds that it authorized independent fee actions, perhaps because the unusual interpretation placed on the language in that bill by some House members had not yet been brought to his attention. Resp. C.A. Br. Add. A-11—A-12.

Following enactment of the HCPA, the DOE has not adopted the position that the HCPA permits an action for fees alone. The DOE's views, initially set forth in a November 12, 1986, response to a letter, are simply that the 1985 House Report would be "relevant" if courts should examine the legislative history in determining whether an independent fee action is permitted. Resp. C.A. Br. Add. A-19. On March 13, 1987, the DOE repeated this statement, but added that the issue was being litigated and that it expected that the dispute "will be clarified in the courts." Resp. C.A. Br. Add. A-21. On June 17, 1988, the DOE merely took the position that court cases had recognized an independent fee action; and on April 14, 1989, the DOE wrote that schools should inform parents of the availability of attorneys' fees but took no position on the issue before this Court. Resp. C.A. Br. Add. A-22—A-24. As a consequence, the DOE has simply not endorsed the position that the HCPA creates an independent cause of action.

The GAO Study. The GAO study authorized by Congress does not establish that an independent fee action is autho-

rized. Instead, given that a parent who must go to court to secure his child's educational rights and who prevails in that forum may recover fees not only for the court action but also for the due process hearing precipitating that action, the study makes sense even if there is no separate fee action. See Pet. at 13 n.4.

CONCLUSION

This Court should grant the petition for a writ of certiorari.[6]

Respectfully submitted,

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[6] Review should not be denied here because of this Court's actions in *Muscogee County School District v. Mitten*, No. 89-905, *cert. denied*, 110 S. Ct. 1117 (1990), and in *Venus Independent School District v. Shelly C.*, No. 89-788, *cert. denied*, 110 S. Ct. 729 (1990). The petition in *Mitten* presented four questions for review, including three that did not need resolution by this Court. The petition in *Shelly C.*, in turn, did not raise the issue presented here because it stated that petitioner had "no disagreement with" a rule "that attorneys fees are available for parties who prevail at an administrative proceeding." 1990 Educ. Hand. L. Rep., Supp. 258 at XIV-45 (Feb. 9, 1990).

(4)

No. 90-461

In the

Supreme Court of the United States

October Term, 1990

District of Columbia, et al.,
Petitioners,

v.

Lani Moore, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICI CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS AND AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards

associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts which NSBA represents receives or is eligible to receive financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. section 1401 et seq. (EHA or the Act). The subject of this case is of great importance to school districts across the country from both an educational and financial perspective.

Amicus curiae National Association of Secondary School Principals is a voluntary association of approximately 42,000 administrators of secondary schools throughout

the United States. It was organized in 1916 to provide a voice for secondary school principals and assistant principals in the formulation of all aspects of educational policy in the United States. Many members of the National Association of Secondary School Principals are thus deeply involved in the day-to-day implementation of the EHA throughout the nation.

Amicus curiae American Association of School Administrators (AASA) is a professional association representing more than 18,000 educational leaders in North America and other parts of the world. AASA is dedicated to enhancing the professionalism of educational leaders who are the key to excellence in our schools and who generally have the ultimate administrative responsibility for supervision of the schools. AASA members are responsible for a major proportion of the nation's 100,000 schools, 2.4 million teachers, and 44 million students. AASA members are affected by court

decisions, such as the one at bar, which deal with education of the handicapped.

REASONS FOR GRANTING THE WRIT

The carefully crafted process established by Congress in the EHA to ensure that every handicapped child receives a free appropriate public education cannot thrive in an adversarial atmosphere created by the antagonism of lawyers who in their zeal to "prevail" seek confrontation rather than cooperation in adopting an individualized education program (IEP) and in the administrative hearing process. The lower court's decision awarding attorney's fees in an action brought solely for the purpose of obtaining fees, errs by fostering this statutory dysfunction.

ARGUMENT

I. The lower court's decision to award attorney's fees to plaintiffs who obtain the desired educational placement for their child through the EHA's administrative proceedings sabotages the cooperative, nonadversarial process Congress constructed to facilitate decisionmaking about appropriate educational placements and services.

A. Congress carefully drew up the EHA's administrative scheme to encourage cooperative decisionmaking between parents and schools in developing appropriate educational placements for handicapped children.

The EHA is a grant statute setting forth broad procedural mechanisms relating to the educational program to be provided handicapped children. The purpose of the Act is to ensure that each handicapped child, as defined under the statute, receives a "free appropriate public education." The statute includes a number of affirmative requirements relating to the evaluation of the child, consultation with parents and educational experts, development of an individualized education program (IEP) and, finally, specific due process

requirements. The rights guaranteed under the EHA are uniquely educational in nature.

As Petitioners point out in their brief, prior to decisions interpreting the EHA attorneys' fees provision, no court had held that a plaintiff may receive an award under a fee-shifting statute where the plaintiff receives all substantive relief without resort to judicial action. These decisions reserving attorney's fees awards only to plaintiffs who prevail in court are appropriate given that administrative proceedings are normally designed to allow the parties to resolve their differences in a forum that is less formal and adversarial than a judicial proceeding and ideally cooperative rather than confrontational. That is particularly true of the EHA's administrative scheme which forms the cornerstone of the Act.

Congress carefully crafted the administrative procedures under the EHA to ensure that parents, the school district,

teachers and other specialists work together to design an "appropriate" educational program for the child, to determine the child's unique educational needs, an appropriate placement to meet those needs, and the "related services" supporting them.

To foster cooperation between parents and the school district, the statute grants certain rights and imposes certain obligations: the right of parents to be present, to participate and to seek advice from experts in the development of the IEP; and the obligation of the school district to take into account the recommendations of the parents' educational experts and to obtain parental permission before making any change in the placement of the child, to name but a few.

The requirement that the school district conduct an IEP conference for each handicapped child is the "modus operandi" of the Act. Burlington School Committee v. Department of

Education of Massachusetts, 171 U.S. 359, 368 (1985). Under the EHA, an eligible handicapped child has the right to be evaluated periodically by a group of experts to determine the child's individual educational needs and to set individual goals for that child. Parents have substantial input into the process through notice at every stage, the right to obtain an independent evaluation which the school district must review, and ultimately, the right to a hearing when there is a dispute. Congress intended the IEP process to be a continuing cooperative process between the experts in the school district and the parents of the handicapped child.

> [It is the method] of involving the parent and the handicapped child in the provision of appropriate services, providing parent counseling as to ways to bolster the educational process at home, and providing parents with a written statement of what the school intends to do for the handicapped child.

> It is not the Committee's intention that the written statement developed at the individual planning conferences be construed as creating a contractual relationship. Rather, the Committee intends to ensure adequate involvement of the parents or guardian of the handicapped child, and the child (when appropriate) in both the statement and its subsequent review and revision . . . By changing the language of this provision to emphasize the process of parent and child involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child.

S. Rep. No. 168, 94th Cong., 1st Sess. 11 (1975).

During debate on the Act, the sponsors discussed the IEP conference at length. Senator Stafford, for example, stated:

> [A]n extremely important aspect is the requirement that each handicapped child will have individual planning conferences. The participants will include the parents, the teacher, and a qualified supervisor or provider of special education services. . . An additional benefit that will result

> from these conferences is one that is too often overlooked. Not only will the child be better served, and the parents better informed of the limitations their child has due to a particular handicap, but the teacher will learn from this experience as well.
>
> As we look more and more toward children with handicaps being educated with their "normal" peers, we must realize, and try to alleviate the burden put upon the teacher who must cope with that child and all the others in the class as well. The teacher needs reinforcement and a better understanding of the child's abilities and disabilities.
>
> It is hoped that the participation in these conferences will have a positive effect on the attitude of the teacher toward the child and an understanding of the child's problems in relating to his or her peers because of a handicapping condition.

121 Cong. Rec. S. 10961 (daily ed. June 18, 1975).

Traditionally, the planning conferences were used as a vehicle for the school district's educational experts to discuss with the parents their child's educational problems and proposed solutions. These conferences

were traditionally informal, held in an office or classroom at the child's school. They were not unlike parent-teacher conferences held periodically between schools and parents of nonhandicapped children, except that the IEP conferences also included special education experts and others in addition to the child's regular teacher. In the past, school district lawyers rarely, if ever, attended such conferences. School attorneys acted, if at all, as advisors, not advocates. The conferences were devoted to discussing needs of the child rather than dwelling at length on the technicalities of language in the IEP document itself. The IEP document is, of course, not unimportant. But also important are the discussions between schools and parents before the document is drafted. This latter element is often missing when lawyers are involved at this stage.

This Court has recognized that Congress intended the IEP process to be a cooperative dialogue between schools and parents:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.
>
> * * *
>
> We previously have cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.' [Citation omitted.] We think that Congress shared that view when it passed the Act. . .
>
> Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies . . . and in the formulation of the child's individual educational program. . .

Board of Educ. v. Rowley, 458 U.S. 176, 207-208 (1982).

If the plan developed at the conference is not in line with the wishes of the parents, they have the right to seek review by a disinterested hearing examiner at a due process hearing. This, too, has traditionally been informal. The school district lawyer in many cases did not attend the due process hearing, and in some cases, the hearing examiners were not lawyers, but were college professors or others with an expertise in special education and assumed the role of a mediator.

B. Allowing a court action solely to obtain attorney's fees converts the IEP and other administrative proceedings in the EHA into expensive, time consuming, adversarial court-like proceedings.

Congress did not intend, through its passage of the attorney's fees provision in the Handicapped Children's Protection Act (HCPA), Pub. L. 99-372, 100 Stat. 796-98 (codified at 20 U.S.C. section 1415(e)(4)(B) et seq.) to change the EHA in any way.

Congress intended to retain the cooperative mechanisms of the IEP and the informal nature of the due process hearing. The sole purpose behind the HCPA was to allow attorneys' fees where the parents were forced to go to court in order to obtain a free appropriate public education for their child. Congress did not intend in the process, to obstruct the administrative scheme it had designed for ensuring that handicapped children receive a free appropriate public education. However, the lower court's decision to allow a court action solely to obtain attorney's fees achieves just that negative result.

NSBA conducted a survey of the membership of its Council of School Attorneys, an organization composed at the time of the survey of approximately 2600 attorneys representing every state and numerous school districts of varied demographics and geographies. The 10% response rate assures a 95% accuracy of the results plus or minus 5%.

The survey concerned the educational and administrative effect of the HCPA. The responses to questions requesting general comments on the EHA and the effect of the attorneys' fee provision on administration of the educational services to handicapped children reveals some disturbing trends.

1. **The educational objectives of the EHA are undermined by the ability to file a court action solely to obtain an attorney's fees award.**

The fear of large attorney's fees awards results in an educational cost. The NSBA survey asked respondents whether they believed that school districts, since passage of the HCPA, are more likely to accept the parents' educational proposal for their handicapped child solely in order to minimize attorney's fees under the Act, rather than because the proposal is educationally appropriate for the child. Forty-seven percent of the respondents answered "yes," fifteen percent said "no" and

the remainder either did not know or did not answer the question.

In the narrative section of the survey form, the respondents expanded on their answers. One attorney stated that school districts have two reasons for "giving in," one in order to minimize attorney's fees and the other to avoid conflict with the parents. Another responded that the problem of conceding to parental wishes is especially common where parents do not want to admit that their child needs special education. The schools in such cases will not insist on the services needed by the children, if the parents refuse to cooperate. Another lawyer agreed, saying that school districts tend to avoid conflicts by agreeing to parents' demands as they prefer to spend money on educational programs rather than attorney's fees. "District personnel have expressed the concern that they are being held hostage by the attorney fees provision. Application of

professional judgment is tainted by the fear of attorneys' fees." "Decisions to concede to parent demands involving services believed to be unnecessary or inappropriate are frequently the result of concern that, at the hearing, the parents will prevail on at least one of their numerous issues and thus qualify for fees."

This has also led to attorneys making demands, having little or no relationship to a free appropriate public education, which they have no hope of achieving. Parents in one Washington, D.C. suburb requested season tickets to the Washington Redskins' football games for the family as a "related service" for an emotionally disturbed child. Making such demands entails no risk; if the student's ultimate educational plan includes anything requested by the parents, their lawyers charge the school district attorney's fees. But the educational process suffers through needless delays and animosity between parents and

school personnel; Congress' carefully drawn consensus-building arrangement is for naught.

Said another respondent, "Fighting for a matter of principle has become too great a financial liability for small, underfunded districts." One respondent estimated that hearings cost $3000 to $5000 at a minimum, even if the school district wins. Because of this cost, most of this lawyer's school district clients meet the parental demands, even if they are not appropriate for the child -- a most unfortunate result. One lawyer stated that virtually all of his firm's approximately 37 school district clients confirmed a trend of accepting parental demands whether or not appropriate. Another stated:

> The threat of attorneys' fees is so overwhelming, it has become the single decisive factor in determining a school's position because they [the parents] can get attorneys' fees even if they only win on one of many issues. This process has gotten out of hand and abuses are rampant.

Another said, "districts consciously compute the cost of providing the placement/service and weigh it against the cost of attorney fees and other 'due process' costs. Child benefit is not a part of this equation."

Similarly, another stated:

> Since passage of HCPA, special education departments have been hampered by trying to out-maneuver opposing counsel while trying to offer an appropriate education for the special education child. Oftentimes, the special education department is intimidated by opposing counsel into offering a less acceptable IEP than would have been offered.

One respondent told of a case, where at a recent meeting of parents of handicapped students, a parent encouraged the others to take the school district to hearings over and over again -- even on the same losing issue. Eventually, the school district will tire of paying the costs of going to hearings and will yield. According to this respondent, hearings in the respondent's school district

have become more adversarial because the parents' attorney, who seeks an attorney's fees award, and school districts, who may have to divert money for educational programs to pay such awards, have more at stake.

One respondent to NSBA's survey stated, "the process is too formalistic and legalistic. These children need teaching, not lawyering." This statement reflects the significant educational cost of the involvement of attorneys at the administrative level.

2. The availability of attorney's fees through a court action brought solely for that purpose has transformed the IEP conference and other administrative proceedings from a decisionmaking process on educational issues into adversarial legal contests.

Following the passage of the HCPA, participation of attorneys at the IEP conference has increased. Their presence has transformed what should be an educational conference into a "pre-trial discovery"

session. According to a number of survey respondents, parents or their attorneys frequently request a hearing at the initial IEP conference without indicating what the parents are seeking for their child. Rather than treating the meeting as an educational conference, as intended by the EHA, parents' lawyers often use it to "discover" the school district's "case" and prepare for what has become an adversarial due process hearing. As a consequence, the IEP conference is rendered meaningless and the due process hearing becomes a full-blown trial with counsel for the parents sometimes displaying more interest in rules of evidence than in the development of an appropriate educational program for the child.

The presence of lawyers at the IEP conference changes the environment. No longer is it an amicable atmosphere in which schools and the parents can discuss informally the educational needs of the child. Lawyers feel

more comfortable in an adversarial setting with black and white legal issues on which they can take positions and argue until they either win or lose. Their expertise is more conducive to confrontation than consensus. Parents' counsel sometimes begin posturing from the moment they arrive at the conference. They cross-examine the special education director and other school officials and attempt to incorporate as many points as possible into the IEP in order to preserve issues for the due process hearing. Under such circumstances, the IEP conference becomes formal, confrontational and legalistic with little opportunity for dialogue. Both parents and school people are less likely to develop openly an appropriate educational plan for the child in a cooperative spirit; instead, the attorneys for both parties conduct "negotiations." With lawyers involved, the IEP conference does not have a chance to work

the way Congress intended when it passed the EHA.

Parents' attorneys also seek to sabotage the IEP conference for another reason -- to ensure that they are paid even when the school district would be willing to give the parents what they want from the outset. One survey respondent reported hearing an attorney who represents handicapped children state at a recent conference that he advises his clients to involve legal counsel early and to demand a hearing as soon as possible. In this way, if the parties settle before a hearing, the parents can go to court and request fees as prevailing parties simply because they requested certain services and the school district was agreeable. This strategy paid off in the case of Joiner v. District of Columbia, 16 EHLR 424, (D.D.C. 1990), where a court awarded fees even though the school district had prevailed at the hearing. Sometimes when counsel for the parents and the

school officials reach an agreement as to an IEP, it is labeled a "consent agreement" and includes language stating that the parents are the "prevailing party." Without the involvement of lawyers and the unpleasant feelings created by their adversarial nature, the school and parents could likely have developed a mutually satisfactory educational plan appropriate to the child's needs earlier during the IEP conference, had the process been allowed to progress on its ordinary course as contemplated by the EHA.

An indication that the IEP process is not functioning as envisioned by Congress is the not infrequent situation where, at the conclusion of the conference, the school district still does not know what the parents want. This arises when parents and their counsel refuse to tell the school district either what they want for the child or what they believe is wrong with the program presently offered or proposed to be offered by

the school district. The school learns the parents' demands for the first time when it is served with a "due process complaint."

At least one court has recognized that such tactics disserve the very interests of handicapped children that the Act is intended to protect and, therefore, denied attorney's fees to plaintiffs. In Johnson v. Bismarck Public School District, No. A1-90-144 (D.N.D. Oct. 15, 1990), a U.S. district court found that neither the parents nor the parents' lawyer shared any of their concerns about the child's IEP during the two months in which the parents were represented by the attorney. The attorney received a postponement of the IEP meeting and failed to attend the rescheduled meeting. The school district officials called him at which time he told them he had forgotten about the meeting. A week later the attorney filed a "due process complaint." The school district complied with all of the requests in the complaint and the attorney

filed a request for attorney's fees. Interestingly, the bill included the time spent on the telephone when the school called the lawyer to ask why he had not attended the conference. The court in granting summary judgment for the school district, stated:

> Although Plaintiff obtained the relief sought in the due process complaint and could be construed as the prevailing party, the court is left with the belief that the same relief and assistance for Michael could have been obtained sooner and without the complaint had Plaintiff specifically made known her requests. Although the court's authority to reduce fees under Title 20 U.S.C. section 1415(e)(4)(F)(i), for unreasonably protracting the final resolution, arguably applies to a parent's actions once the action has commenced (and the action commences with the filing of the complaint) the court finds that the final resolution was unreasonably and unnecessarily protracted due to Plaintiff not making known to Defendant her specific requests prior to the filing of the due process complaint.
>
> Plaintiff's brief in support of the motion for summary judgment points out the importance of protecting the rights of handicapped children. The court could not agree more. To advocate for the rights and needs of

> a handicapped child, however, is not to remain silent until one has met the procedural requirements for an award of attorney's fees.

Slip op. at 5-6.

3. Parents' attorneys are misinterpreting and the lower courts are misapplying the "prevailing party" standard.

Although the survey instrument did not expressly raise the issue of "prevailing party," a number of respondents expressed serious concern as to whether the term is appropriate in the context of EHA administrative proceedings, which Congress intended to be cooperative and not adversarial. One respondent wrote:

> [M]uch of the problem lies in the "prevailing party" standard which may work adequately in other civil rights cases which have "verdicts" which are easier to label who prevails. It is an oxymoron to have prevailing parties at IEPC's [individualized education program conference] or at due process hearings in light of the collegial process recognized by the Court in Rowley [Board of Education v. Rowley, 458 U.S. 176 (1982)] and Burlington [Burlington School Committee v. Department of Education

of Massachusetts, 471 U.S. 359 (1985)].

Under other fee-shifting provisions, the "prevailing party" is the one who defeats another party in an adversarial contest where the parties have sharply opposing positions. In EHA cases where the matter is resolved at the administrative level, the parties may not have divergent interests. Although the parents may "prevail" in the sense that they accomplish their purpose, the same might also be said of the school district; an agreement on the appropriate educational program for the child means that they both achieve their end. If, however, the parents must go to court to obtain an appropriate educational program for their child, then and only at that level do they truly "prevail" in the sense intended by the fee-shifting provision. Amici believe that the Congress was correct in requiring payment of fees in this later stage. To allow fees only if the dispute reaches the level of

judicial review is consistent with Congress' intent that the fee-shifting provision under the EHA be interpreted in the same fashion as the courts have interpreted fee-shifting provisions under other federal statutes, i.e., the right to attorney's fees is established only if the party must go to court to obtain substantive relief.

That school districts are receiving bills from parents' lawyers even where the school district does not contest the demands of the parent reflects the misapplication of the prevailing party concept at the administrative level. Two respondents stated that their clients had received bills from attorneys after IEP conferences which the parents' attorney did not even attend. The school district did not know the parents had consulted with an attorney until the school district received the bill. These parents contended that they "prevailed" although the school district never disputed the parents

demands either because the school district agreed with the parents or because the school district wanted to avoid a controversy with the parents.

One respondent noted that parents are seeking attorneys' fees even where they are merely requesting minor changes in their child's educational program that have little or nothing to do with the child's handicap, such as a request to change an English class from first to second period.

It should also be noted that education is an art, not a science. Therefore, it is possible for reasonable minds to disagree on educational issues. A school district might have a good faith disagreement with the parent as to the educational needs of the child. At some point during the IEP and administrative process, the school district may decide to accede to the parents' wishes. Some courts have treated the parents in such situations as prevailing parties. Under this

interpretation, if the parents have consulted counsel, their attorneys are entitled to attorneys' fees from the school district even if all participants agree to an IEP plan at the IEP conference -- an absurd result.

4. Attorney's fees awards in judicial proceedings brought solely for that purpose result in misallocation of educational dollars.

The economic costs to the school district include not only the expense of attorney's fees but also the increase in staff time and other administrative costs due to the contentious nature of the proceeding provoked by the presence of attorneys.

Respondents to the survey were requested to indicate the financial result of requests for attorney's fees at the administrative level. Because many of the cases were handled by the school districts without the assistance of their attorneys or because the attorneys themselves did not know the amount of the attorney's fee requests, only a limited number

of respondents were able to provide actual figures. Appendix A consists of a table showing the amount of the fees paid to parents' counsel at each level of the administrative process. The insurance carrier for one state stated that the average cost of representation at the administrative level is between $40,000 and $50,000.

Sometimes school districts have little choice but to pay questionable amounts in attorney's fees in order to avoid the additional cost of paying their own lawyer to challenge the amount in a lawsuit filed by the parents' attorney solely for that purpose. The school district must accept the statement of fees submitted by the parents' attorney as correct unless it is willing to risk the expense of an entirely new lawsuit filed for that purpose. In the wealthier school districts, where parents can hire high priced attorneys, the bill can be very steep. In the poorer school districts, scarce resources are

taken away from pressing educational programs and services to pay legal fees. Although school board attorneys often reduce their regular charges for their client school boards, the opposite is true for parents' lawyers. Private attorneys representing parents will often bill school districts at their highest rates and attorneys for publicly funded advocacy groups frequently charge the rate billed by partners in highly paid law firms in town. Often the school district is billed for hours worked before the school district has even been made aware of the parents' demands.

C. Congress did not intend the attorney's fees provision of the EHA to cause financial and educational disruption in the administration of the Act.

It is evident from the discussion above that lower court interpretations permitting actions for attorney's fees alone, are causing great financial hardship and educational disruption in the administration of the EHA.

In addition, as documented above, the interpretations of the lower court in the instant case and other courts of appeals have achieved the bizarre result of, in effect, repealing the EHA'S cooperative educational processes and transforming the administrative process into full scale adversarial proceedings which benefits the lawyers but does not necessarily serve the interests of handicapped children. If Congress had intended to apply the fee-shifting provisions of the EHA in a different manner than all other fee-shifting provisions and to make such enormous changes in the administration of the EAHCA, then Congress should have made that clear in the language of HCPA. It did not do so.

CONCLUSION

Since attorneys have become involved in the administrative process, school districts have been shifting their efforts from education to litigation control. Private

lawyers hide their lack of knowledge about the educational process and the purpose of the IEP requirement, behind bravado and antagonistic posturing. Lawyers for handicap advocacy groups often bring to the IEP conference a presumption that school people are acting in bad faith; they attempt to cram everything possible into the IEP in order to set precedents and open "new frontiers." In both scenarios -- in order to avoid attorney's fees -- school districts are forced to plan litigation strategies instead of strategies for providing an appropriate education for the child.

It is the nature of school people to want to do what is best for the child. Their predisposition to help children often is what motivated them to choose education as their life's work. But when attacked or intimidated by lawyers at the IEP conference, they naturally become defensive, causing the IEP process to begin deteriorating. They are

forced to take a path contrary to their mission. The school district may accede to parental demands without regard to their appropriateness, thus ignoring its legal obligation to students. Alternatively, if the school district attempts to persuade parents that their demands are not educational sound, the parents may abort the IEP process by refusing to discuss anything further and move directly to a hearing. Congress certainly did not envision this appalling result when it enacted either the EHA or the HCPA. Such problems did not exist before courts began to interpret the HCPA as allowing fees solely for work performed at the administrative level. Schools cannot properly fulfill their obligations to handicapped children under the current judicial interpretation of the HCPA. The carefully crafted process created by Congress to ensure that every handicapped child receives a free appropriate public

education cannot function in an atmosphere polluted by antagonism.

Amici urge this Court to review this case and correct the grievous error of the lower court in its misinterpretation of the words of the statute and of the precedents of this Court.

Respectfully submitted,

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APPENDIX

I. Pre-I.E.P. conference
II. Post-I.E.P. conference
III. Pre-hearing
IV. Administrative hearing
V. Post-administrative hearing
VI. Appeal to state department of education

I	II	III	IV	V	VI
600	6,000	20,000	40,000	65,000	40-50,000*
	5,000	17,000	40,000	33,000	21,000
	2,210	12,000	29,000	7,500	8,875
		8,000	17,000	6,000	5,170
		7,500	15,000	5,600	5,000
		5,000	13,050	2,971	4,300
		3,800	10,830	2,000	3,637
		3,200	7,500	600	

* Estimate of the insurance carrier for one state of the average representation at administrative level alone.

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II. Post-I.E.P. conference
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VI. Appeal to state department of education

I	II	III	IV	V	VI
		3,000	7,500		
		3,000	7,050		
		2,000	6,500		
		2,000	6,000		
		1,600	5,000		
		1,600	5,000		
		1,530	5,000		
		1,500	5,000		
		1,200	4,022		
		405	3,468		

I. Pre-I.E.P. conference
II. Post-I.E.P. conference
III. Pre-hearing
IV. Administrative hearing
V. Post-administrative hearing
VI. Appeal to state department of education

I	II	III	IV	V	VI
			3,357		
			2,500		
			2,095		
			2,000		
			2,000		